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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1929.

No. 60.

The Railroad Commission of the State of California, and The City of Los Angeles,
Appellants,
vs.
Los Angeles Railway Corporation (a corporation),
Appellee.

BRIEF OF APPELLEE, LOS ANGELES RAILWAY CORPORATION.

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Appellants,

vs.

Los Angeles Railway Corporation (a corporation),

Appellee.

BRIEF OF APPELLEE, LOS ANGELES RAILWAY CORPORATION.

STATEMENT.

Los Angeles Railway Corporation, appellee, operates a unified rail and motor bus transportation system in and adjacent to the city of Los Angeles. Its street cars occupy the streets of the city under and by virtue of certain franchises granted by the city of Los Angeles and by the county of Los Angeles. The franchises granted by the City provide for a 5¢ fare.

On November 17, 1926, the Company applied to the state railroad commission for an increase in fare, claiming its 5¢ fare was confiscatory. [R. 75-111.]

While that application was pending the Company, on May 17, 1927, filed a supplemental application with the Commission praying a 6¢ fare pending the decision of the Commission on its original application [R. 111-161]. Said supplemental application was denied by the Commission June 20, 1927. [R. 161-4.]

The Commission held hearings on said original application at various times up to August 11, 1927, when the matter was submitted [R. 166]. On March 26, 1928, the Commission rendered its Decision No. 19521 denying the Company's said application and refusing an increase in the Company's fare. [R. 165.]

Petition for rehearing [R. 175] having been filed by the Company within the statutory time and denied by the Commission [R. 196], the Company, on June 22, 1928, filed its bill of complaint in the District Court claiming its 5¢ fare was confiscatory and that the Commission's said Decision No. 19521 was arbitrary and violative of its rights under the Federal Constitution.

After extended argument by all parties, and the submission to it of voluminous affidavits, briefs, and **the entire Commission record,** the District Court, Circuit Judge Wm. H. Hunt presiding, issued its permanent injunction on October 1st, 1928, enjoining the enforcement of the Commission's said decision and permitting the Company as a condition of the injunction to charge a fare not in excess of 7¢ cash or 4 tokens for 25¢. [R. 563.]

A stay of injunction pending appeal was unanimously denied by the District Court on October 2, 1928, and by this Court on October 15, 1928.

The increased fare permitted by the injunction was put into effect October 21, 1928, and has since been charged and collected by the Company.

At oral argument in the District Court it was stipulated that the Company's rail and bus operations constituted a unified system and that they were so considered by the Commission [R. 521]; that for the purpose of the motion for injunction the Company would accept the Commission's rate base of $42,000,000 [R. 522-3]; and that the entire case might be finally disposed of on the record then before the court. [R. 523-4.]

The court below, accepting the Commission's own figures, found that the record showed **"very clearly"** that the finding of the Commission that the 5¢ fare was fair and reasonable was not supported by the evidence and that the Company's property was being confiscated. [R. 548.]

In their briefs neither appellant has questioned the sufficiency of the evidence to sustain the conclusion thus unanimously reached by the statutory court. Consequently it would seem unnecessary for us to discuss the question. However, since appellants have not conceded the existence of confiscation and since this Court is free to consider the assignments of error which raise that question, we feel constrained, out of an abundance of precaution, to demonstrate from the record the clear showing of it referred to by the court below. Such a showing, we feel, should logically be at the opening of this brief, in order that the

Court might at once perceive its conclusiveness, but for the convenience of the Court we will first meet the legal points urged by appellants, and thereafter show from the record that the court below was not only justified in the conclusion which it reached on the subject, but could have arrived at no other.

Appellants contend that it is immaterial if the 5¢ fare be clearly shown to be confiscatory, and that the court below was powerless to grant relief therefrom because the fare provisions of the Company's franchises constitute binding contracts which the City had power to make.

ARGUMENT.

The Company contends that under the laws of California the City has never possessed the power to fix public utility rates by contract; that the City never intended so to contract; that, consequently, the Company's franchise fare provisions are not and cannot be binding contract obligations; and that, hence, in this action the Company stands in like position with that presented in *San Antonio v. San Antonio Public Service Co.* (1920), 255 U. S. 545, *i.e.*, a public utility, finding its franchise fares unremunerative and confiscatory, appeals for relief to the only state agency authorized to grant it relief, and upon arbitrary denial of relief there, asks a Federal Court of Equity to preserve to it its constitutional rights against the deprivation of its property without just compensation.

The Company also contends that even assuming for the purpose of argument that the fare provisions of its franchises constitute binding contracts the Commission exercised complete jurisdiction over said fare and abrogated

such contracts when, in 1921, it found the 5¢ franchise fare inadequate and authorized a 6¢ fare.

In supporting this position and the decree below the ensuing argument, therefore, will show:

I. The City has never possessed the power to fix public utility rates by contract.

(a) In California municipal police powers have been zealously guarded from impairment by contract.

(b) A grant of authority to contract away the police power must be unequivocal.

(c) There is no grant of authority to the City to fix public utility rates by contract.

II. Under the state Constitution the Legislature cannot fix public utility rates by contract nor delegate power to the City to do so.

III. In California the grant of a franchise is a legislative function and where, as here, no grant of authority to fix rates by contract exists, franchise fare provisions cannot operate by way of condition or estoppel.

IV. The fare provisions of these franchises evince an intention to regulate not to contract.

V. The Commission has twice exercised jurisdiction over the Company's franchise fare.

(a) Decision No. 9029 (1921).

(b) Decision No. 19521 (1928).

VI. Confiscation.

FRANCHISES.

The Commission concedes, correctly of course, that none of the California decisions relied upon by appellants (all of which in general language refer to a franchise as a contract) involved the power of a city to contract as to

public utility rates. Neither did those cases, nor any others in California, decide that the rates or fares prescribed in a franchise are binding contract obligations or that a city may by contract surrender the police power of the state. In fact, in the case of *St. Helena v. San Francisco, etc., Ry.* (1914), 24 Cal. App. 71, 74, the District Court of Appeals definitely stated the contrary:

> "Of course, regardless of such agreement, it is well settled that the municipality cannot abdicate its functions or by contract divest itself of power to control the streets for the benefit of the public. 'The improvement, regulation and control of the highways within a municipality call for **the exercise of a delegated governmental power, a function which the municipality itself, neither by ordinance nor by contract, can surrender or impair.**' (McNeil v. City of South Pasadena, 166 Cal. 153, 135 Pac. 32.)"
>
> *St. Helena v. San Francisco, etc., Ry.* (1914), 24 Cal. App. 71, 74.

That the regulation of public utility rates is an "undoubted power of government" (Home Tel. & Tel. Co. v. Los Angeles (1908), 211 U. S. 265, 273), will scarcely be denied.

I.

THE CITY HAS NEVER POSSESSED THE POWER TO FIX PUBLIC UTILITY RATES BY CONTRACT.

Nowhere in the Constitution or the statutes of the state does there appear sufficient language to indicate the clear and express intention of the state to abrogate its police power and to delegate to municipalities the authority to fix public utility rates by contract. Unless such intention

does clearly and expressly appear, the courts will refuse to imply it from other or general language or as an incident of general powers, and will deny its existence.

The City has heretofore successfully maintained before this Court that it had no power to enter into a binding contract with a public utility fixing rates to be charged. (Home Tel. & Tel. Co. v. City of Los Angeles (1908), 211 U. S. 264, 273.) It can easily be demonstrated that such [redacted] power in the City to fix rates by contract never existed.

(a) In California Municipal Police Powers Have Been Zealously Guarded From Impairment by Contract.

The general principle that municipal police powers cannot be contracted away has been definitely recognized and unequivocally endorsed by the supreme court of California, which has held that even an attempt so to contract would have no force.

In *Laurel Hill Cemetery v. City and County of San Francisco* (1907), 152 Cal. 464, 475-6, a question arose over the power of the city to prevent interments in a cemetery. It was held that the exercise of the future police power of the city would not be affected even if the city had previously contracted with the grantors of the plot to make interments in perpetuity, the supreme court saying:

> "Even if the city and county had made an express contract granting to the plaintiff the right to make interments in this ground in perpetuity, **such contract would have no force as against a future exercise by the legislative branch of the government of its police power.** (Brick Presbyterian Church

v. Mayor, 5 Cow. (N. Y.) 538.) **This power cannot be bargained or contracted away, and all rights and property are held subject to it.** (Boston Beer Co. v. Massachusetts, 97 U. S. 25; Butchers' Union v. Crescent City Co., 111 U. S. 746 (4 Sup. Ct. 652); New Orleans Gas Co. v. Louisiana Light etc. Co., 115 U. S. 650 (6 Sup. Ct. 252).)"

Laurel Hill Cemetery v. City and County of San Francisco (1907), 152 Cal. 464, 475-6.

McNeil v. City of South Pasadena (1913), 166 Cal. 153, arose over an attempt to apportion to a street railway company a part of the cost of paving a street under a general statute. The company contended that its franchise required it to pave only one-fourth of the street and that to compel it to pay a portion of the cost of the entire paving would impair the obligation of its contract. The supreme court held:

"The improvement, regulation, and control of the highways within a municipality call for the exercise of a **delegated governmental power, a function which the municipality itself, neither by ordinance nor by contract, can surrender or impair.** The city of South Pasadena draws its powers from the general laws—the Vrooman Act. It is its duty to exercise those powers upon every proper occasion. It could as well attempt to surrender all or part of its **police powers** as to attempt to bind itself not to perform the administrative duty and trust in regard to its public streets imposed upon it by general law."

McNeil v. City of South Pasadena (1913), 166 Cal. 153, 156.

(b) A Grant of Authority to Contract Away the Police Power Must Be Unequivocal.

It is established in California that statutes defining the powers of a municipal corporation must be strictly con-

strued against such corporation and in cases of doubt the power denied.

The state supreme court in construing certain provisions of a charter of the city of Stockton, relating to public utilities, in *Oro Electric Corporation v. R. R. Commission* (1915), 169 Cal. 466, 477, said:

> "It is thoroughly settled that language purporting to define the powers of a municipal corporation is to be strictly construed, and that any **'fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.'** (1 Dillon on Municipal Corporation, Sec. 89.) This rule has been clearly announced by this court in various cases, of which it will suffice to cite Von Schmidt v. Widber, 105 Cal. 151 (38 Pac. 682), and Hyatt v. Williams, 148 Cal. 585 (84 Pac. 41.)
>
> *Oro Electric Corporation v. R. R. Comm.* (1915), 169 Cal. 466, 477.

And this Court, in construing the provisions of a charter of the city of Los Angeles, upon the successful contention of the **City** that a franchise fixing telephone rates **did not** constitute a binding contract, held, in *Home Tel. & Tel. Co. v. City of Los Angeles* (1908), 211 U. S. 265, 272-3:

> "Two questions obviously arise here. Did the city council have power to enter into a contract fixing, unalterably, during the term of the franchise, charges for telephone service, and disabling itself from exercising the charter power of regulation? If so, was such a contract in fact made? * * * The surrender, by contract, of a power of government, though in certain well defined cases it may be by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legis-

lature (in this case, the legislature of the state) has the authority to make such surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state, are not sufficient. **Specific authority for that purpose is required.** This proposition is sustained by all the decisions of this court, which will be referred to hereafter, and we need not delay further upon this point * * *. (pp. 272-3.)

"* * * But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, **and all doubts must be resolved in favor of the continuance of the power.**" (p. 273.)

Home Tel. & Tel. Co. v. City of Los Angeles[1] (1908), 211 U. S. 265, 272-3.

This fundamental rule of statutory construction was also tersely stated by the District Court of the Northern District of California in *San Francisco-Oakland Terminal Rys. v. City of Alameda* (1914), 226 Fed. 889, 890, where, in holding that many of the same statutory enactments relied upon by appellants here granted no power to contract as to street railway fares, said:

"* * * neither the existence of the contract nor the power to make it is to be deduced by means of refined construction of terms or shadowy implication from general language, but must appear from

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[1]See, also:

Railroad Commission Cases (1885), 116 U. S. 307, 325;

Milwaukee Elec. Ry. & Light Co. v. R. R. Comm. (1915), 238 U. S. 174, 180;

Paducah v. Paducah Ry. Co. (1923), 261 U. S. 267, 272.

the plain and unequivocal expression of such purpose."

San Francisco Oakland Term. Rys. v. City of Alameda (1914), 226 Fed. 889, 890.

(c) THERE IS NO GRANT OF AUTHORITY TO THE CITY TO FIX PUBLIC UTILITY RATES BY CONTRACT.

Appellants contend that several legislative enactments confer upon the City the power to contract as to public utility rates. It is significant that in none of them is there any express grant of such power nor any language from which, under the well established rule of construction above shown, the intention of the Legislature so to do clearly and unmistakably appears. In the court below the City conceded that it had never been granted the authority to contract away the police power of the state to regulate rates.[2]

Civil Code.

Section 497, Civil Code, relied upon by appellants, undoubtedly confers upon the City the power to grant street railway franchises **"under such restrictions and limitations and upon such terms * * * as the city * * * authority may provide."**

---

[2]City's brief before District Court, referring to the *Home Telephone* case and the *San Francisco Oakland Terminal Railway* case, *supra*, said:

"From the foregoing cases it is apparent that the state has never relinquished its right to regulate the rates of public utilities."—(p. 13.)

"These cases undoubtedly indicate that this city has never obtained the power to barter away the police power of this state—the power to regulate the rates of fare set forth in franchise contracts, subsequent to the date they are granted."—(p. 14.)

Section 501, Civil Code, also relied upon by appellants, (providing that the rates of fare on street cars must not exceed 10¢ and in municipal corporations of the first class must not exceed 5¢) contains, of course, no grant of power but is simply a limitation on the power conferred by the preceding section 497. Moreover, the city of Los Angeles has never been a city of the first class. (Stats. 1897, p. 42; Stats. 1901, p. 94; Stats. 1911, p. 476; Stats. 1921, p. 1654; Department of Commerce Statistical Abstract of U. S. 1928, p. 44.)

Both of these sections of the Civil Code, however, have definitely been held not to carry the power to contract for street railway rates. In the case of *San Francisco Oakland Terminal Railway v. City of Alameda* (D. C. 1914), 226 Fed. 889, 890-1, the city of Alameda had fixed railway rates by franchise. Subsequently, the city sought to lower the franchise rates by ordinance and the company sought an injunction in the Federal Court which was denied and the bill dismissed on motion of the city. The company contended that the fares fixed by the franchise constituted a contract. The District Court for the Northern District of California, in passing upon the question, reviewed the provisions of the Municipal Corporation Act of 1883 which gave to cities of that class the power **"to permit, under such restrictions as they may deem proper, the laying of railway tracks"** and **"to do and perform any and all other acts and things necessary or proper to carry out the provisions of this charter and to exact and enforce within the limits of such city all other local, police, sanitary, and other regulations as do not conflict with general laws"**; the provi-

sions of the freehold charter of said city which provided that the city had power **"to fix, alter, regulate and control fares * * * on all * * * railways within the city * * *;"** and the provisions of **Civil Code, sections 497, 501 and 503.** Holding that under none of these statute or charter provisions was there any power to contract, the court said:

> "* * * No attempt is made by plaintiff to point out in any general statute governing its powers or in its charter any specific grant of authority to the city to contract away, even for a limited time, the governmental power of rate regulation; but the argument is that such authority is to be implied from the powers expressly conferred, and the want of any express reservation against the right to contract, as to such rates. But it will be readily seen that, within the limitations of the above stated principles, no such implication can be predicated of the language employed by the Legislature in any expression it has given upon the subject. * * *
>
> "It is apparent that these provisions, **especially those of the Civil Code and the charter,** while undoubtedly conferring power upon the city to regulate rates, are wholly wanting in any expression either directly or by implication indicating a purpose on the part of the Legislature to authorize a municipality to restrict or barter away the power there given."
>
> *San-Francisco-Oakland Terminal Ry. v. City of Alameda* (D. C. 1914), 226 Fed. 889, 890-1.

Franchise Acts.

The Franchise Act of 1893 (Stats. 1893, p. 288), and the Broughton Franchise Act (Stats. 1905, p. 777), which replaced it, both of which are referred to by appellants, each contain, as originally enacted and as amended, and as they continued to be the law of the state up to 1915,

the identical language that the franchises therein mentioned **"shall be granted upon the conditions in this act provided, and not otherwise."** In the *Home Telephone case, supra,* this Court, in construing this same language of this same act, said:

> "Here is an emphatic caution against reading into the act any conditions which are not clearly expressed in the act itself. In view of this language it cannot be supposed that the legislature intended that so significant and important an authority as that of contracting away a power of regulation conferred by the charter should be inferred from the act, in the absence of a grant in express words. But there is no such grant."
>
> *Home Tel. & Tel. Co. v. City of Los Angeles* (1908), 211 U. S. 265, 275-6.

Moreover, the state supreme court in 1915 held that the Broughton Franchise Act contained no grant of power but was simply procedural, saying in the *Oro Electric Corporation case, supra:*

> "Finally, the petitioner claims that the 'Broughton Act' (Stats. 1905, p. 777), gave to every city authority to grant franchises for transmitting electric light and power. But we think it clear that this act merely places restrictions upon the granting of franchises, where the power to grant such franchises exists otherwise. As was said in *Sunset Tel. & Tel. Co. v. Pasadena,* 161 Cal. 265, 272 (118 Pac. 796), the 'whole purpose' of the act 'was to prescribe the method and conditions upon which the franchises included within its terms might be granted by the legislative body authorized by law to make the grant'. The act does not authorize any board or council to grant a franchise."
>
> *Oro Electric Corp. v. R. R. Commission* (1915), 169 Cal. 466, 482-3.

It is clear, therefore, that neither the above quoted sections of the Civil Code nor of the franchise acts up to 1915, confer any power on the City to contract as to street railway or any other public utility rates. To hold that they do would require an implication almost as shadowy as the other contention of appellants that because they found no power in the city prior to 1905 to regulate rates it followed that the city must have had power to contract as to them.

Appellants further contend, in substance, that the 1915 amendment to section 1 of the Broughton Franchise Act providing that

> "The grantor may, however, in such franchise impose such other and additional terms and conditions not in conflict herewith, whether governmental or contractual in character, as in the judgment of the legislative body thereof are to the public interest." (Stats. 1915, p. 1301.)

empowers the city to write contractual fare provisions in street railway franchises.

It is submitted that the addition of this sentence to the Broughton Act in 1915 did not and could not confer upon the city of Los Angeles the power to fix rates by contract for several very good reasons. First, as stated above, the California supreme court has held the Broughton Act merely to place restrictions upon the granting of franchises and not to be a grant of power. (*Oro Electric Corp. v. R. R. Commission* (1915), 169 Cal. 466, 482-3.) Secondly, since the Act is a restriction upon the power of a municipal corporation to impose conditions on the grant of a franchise and since it might be desirable to allow a city to impose conditions other than those specified which

it might otherwise have power to impose **in exercise** of its police powers rather than in derogation of them, as for instance, requiring a grantee railway to sprinkle the streets or pave a portion of them, the amendment was probably enacted to remove the implied restriction from section 1, to the effect that the franchise "shall be granted on the conditions in this Act provided **and not otherwise.**" Thirdly, in view of the fact that this Court had construed the Broughton Act as not sufficient to confer the power upon the city of Los Angeles to fix rates by contract and had clearly emphasized the necessity for an unambiguous grant of such power if it is to exist, the Legislature surely would not have used such general language as that contained in the 1915 amendment had it had the slightest intent to grant this important power to municipal corporations. Lastly, under the decisions of the California supreme court the Broughton Franchise Act has had no application, force or effect in the city of Los Angeles since the amendment of the charter of said City in 1913. After that charter amendment, the entire Broughton Franchise Act, as we will now show, became wholly inoperative in the City of Los Angeles, so the 1915 amendment to the said act, of course, never applied.

The state Constitution has provided without pertinent change since 1879 that any city containing a population of more than thirty-five hundred inhabitants might frame a charter for its own government "consistent with and subject to the Constitution" by adopting such charter at a municipal election and submitting the same to the Legislature for approval or rejection (Constitution, section 8, Article XI). It is further provided (section 6, Article

XI) that all charters framed or adopted by authority of the Constitution "except in municipal affairs, shall be subject to and controlled by general laws". From these constitutional provisions the state supreme court has definitely established that where a freeholders' charter of a city provides a complete scheme with respect to any given subject, a general law on the same subject is no longer applicable within that city, even though such general law contain some provisions which might be enforced without conflicting with the charter provision. The interpretation of the constitutional sections by the supreme court is that the requirements of such charter provisions are exclusive as to municipal affairs and contain all of the conditions and requirements that can be imposed. It will not be denied that at least since 1889 the city of Los Angeles has been a freehold charter city. (Stats. 1889, p. 455.) It can scarcely be denied that the granting of a street railway franchise is a municipal affair. (*City of San Diego v. Kerckhoff* (1920), 49 Cal. App. 473, 480.)

In *Loop Lumber Co. v. Van Loben Sels* (1916), 173 Cal. 228, 232-234, the freeholders' charter of the city and county of San Francisco contained a complete scheme for letting contracts for public works, but made no mention of a bond to protect labor and material men. A general law of the state required such a bond to be filed. The state supreme court held that such a bond given by a contractor for the construction of a public work in the city and county of San Francisco was unenforcible as being without consideration, saying:

"But at the time of the execution of this contract and the giving of this bond, section 6 of Article XI

of our state Constitution was such as to make the freeholders' charter of cities and towns absolutely controlling and free from impairment by general laws of the state, as to all 'municipal affairs'. Although the phraseology of the section was changed by the amendment adopted November 3, 1914, the same result still obtains. In so far as such a charter makes provision relative to any 'municipal affair', it is the supreme law, paramount to any law enacted by the state Legislature, and general laws enacted by the Legislature in regard thereto can have no application. * * *

"And we do not think it can be seriously questioned that a municipality may provide in its freeholders' charter for a complete scheme for the doing of such work that will be paramount to anything contained in any act of the State Legislature, and that in regard to such municipality anything contained in any general law of the state that is inconsistent with the charter provisions must be inoperative. * * *

"* * * It seems to us to be perfectly clear that a state statute imposing other conditions on the contractor, and prohibiting the commencement of work under the contract until he has complied therewith, is inconsistent with the charter provisions on the subject, and, consequently, ineffectual for any purpose. It is urged that the act is not in conflict with the charter for the reason that the latter contains no provision at all in regard to such a bond as is required by the act—**neither requires such a bond nor in terms declares that no such bond is essential**. But this in no degree affects the question. * * * Any law purporting to impose other conditions as a prerequisite to doing the work is necessarily inconsistent with the charter. It is not a case where the charter is silent upon the matter, and the au-

thorities cited by respondent in this connection are therefore not in point."

Loop Lumber Co. v. Van Loben Sels (1916), 173 Cal. 228, 232-234.

Similarly, the supreme court held that the freeholders' charter provision of the city and county of San Francisco for issuing bonds for public improvements superseded the State Park and Boulevard Act (*Fritz v. San Francisco* (1901), 132 Cal. 373, 375, 376), and that the freehold charter provision of the city of Los Angeles on the question of opening a crossing over a railroad right-of-way superseded the provisions for condemnation proceedings under the state Public Utilities Act of 1915 (*City of Los Angeles v. Central Trust Company* (1916), 173 Cal. 323, 327, 328).

This interpretation of the state constitutional provisions was likewise applied to the Broughton Franchise Act in *City of San Diego v. Kerckhoff* (1920), 49 Cal. App. 473, 480. There the freeholders' charter of the city of San Diego contained a power to the city to grant franchises. The question arose as to whether the city charter provisions or the Broughton Act controlled, and the court decided that the city charter provision must control, saying:

"As has heretofore been stated, the municipal charter of San Diego covered the subject of granting franchises for street railroads at the time respondents' grant was made. That subject being a municipal affair, the charter provisions controlled over the Broughton Act. * * *"

City of San Diego v. Kerckhoff (1920), 49 Cal. App. 473, 480.

In 1913 the freeholders' charter of the City of Los Angeles was amended[3] to provide for an entire and complete system for granting franchise over the streets of the city, such provision being similar to the charter provision of the city of San Diego construed in *City of San Diego v. Kerckhoff, supra.*

Under the *Loop Lumber Co. case* and the *Kerckhoff case, supra,* this charter amendment manifestly rendered the Broughton Franchise Act and its 1915 amendment of no force and effect in the city of Los Angeles.

City Charters.

Appellants also rely upon the 1905 amendment to the charter of the City as a possible source of power to fix rates by contract. This amendment added subdivision 25 to section 2, Article I of said charter, as follows:

> "(25). No franchise, right or privilege in, on, through, across, under or over any street, avenue, alley, bridge, viaduct or other public place, and no other franchise whatever granted by the city to any corporation, association or individual, shall be granted except by an ordinance passed by a vote of two-thirds (2/3) of the whole council, nor for a longer period than twenty-one years. **Such grant and any contract in pursuance thereof** shall provide that at the

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[3]"(40). To grant franchises, permits or privileges for the construction and operation of plants necessary or convenient for furnishing the city and its inhabitants with **transportation,** communication, terminal facilities, water, light, heat, power, refrigeration, storage, or any other public service; **to prescribe the terms and conditions of any such grant, and to prescribe by ordinance,** approved by a vote of the people, **the method of procedure for making such grants;** * * *." (Stats. 1913, pp. 1629-33.)

option of the city, declared not more than three (3) years nor less than six months before the termination of such grant, the plant and property, if any, belonging to or used by the grantee, or his or its successors in interest, in the streets, avenues and other public places shall, at the termination of said grant, upon the payment of a fair valuation thereof, be and become the property of the city; but the grantee shall be entitled to no payment because of any valuation derived from the franchise. **Provided, however,** that such option shall not be exercised unless at the time of exercising the same the city shall be authorized and empowered to acquire and operate such plant and property. **Every grant** shall specify the mode of determining any valuation therein provided for and the time and mode of payment, and shall make adequate provision by way of forfeiture of the grant or otherwise to secure efficiency of public service at reasonable rates and the maintenance of the property in good order throughout the terms of the grant." (Stats. of 1905, p. 994.)

Tracing the legislative history of said subdivision 25 clearly indicates that this subdivision was not a grant of power to the City, but a limitation upon its powers.

The charter as it existed prior to the said amendment of 1905 enumerated the powers of the City in section 2 thereof, followed by 24 subdivisions reading as follows:

> "Section 2. The said corporation shall have the power: (1) to make and use a corporate seal and alter the same at pleasure; (2) to sue and be sued in all actions and proceedings whatever; * * * (7) to provide for supplying the city and its inhabitants with water and gas, or either, or with other means of heat, illumination or power * * *." etc., etc. (Stats. 1889, p. 456.)

Each of the first twenty-three subdivisions is an express grant of power, and each of them begins with the word "to". Subdivision 24 read:

"(24). The powers conferred by this Article shall be exercised by ordinance, except as hereinafter provided."

Three new subdivisions were added to section 2 in 1905 and 1909 and each of them is obviously a **limitation** upon the powers of the City. These new subdivisions were added after subdivision 24, as subdivisions 25, 26 and 27, and read in part as follows:

"(25). No franchise right or privilege in, on, through, across * * * any street * * * shall be granted", etc.,

"(26). No wharf, dock, sea-wall, railroad, street railroad * * * owned or controlled by the city of Los Angeles * * * shall ever be sold, transferred, leased or disposed of * * * without the consent of two-thirds of the qualified voters * * *."

"(27). The bed of the Los Angeles River * * * shall not * * * be sold, granted, leased, transferred or alienated in any way * * *." (Article 1, section 2, Charter of Los Angeles; Stats. 1905, p. 994; Stats. 1909, p. 1292.)

In 1911 the charter was further amended to add fifteen new powers (Statutes of 1911, pp. 2051, 2065.) It is striking that all fifteen of these new powers were placed before subdivision 24 and numbered subdivisions 24 to 38. Each grant commenced with the word "to", and former subdivision 24 followed them all as new subdivision 39. With the obvious intent of continuing former subdivisions 25, 26 and 27, *supra,* as limitations, they were renumbered as subdivisions 40, 41 and 42, without substantial change in wording. In 1913, the language of subdivision 40 of section 2 of the charter was amended to become for the first time a grant of power, reading as follows:

> "(40). **To grant** franchises, permits, or privileges for the construction and operation of plants necessary or convenient for furnishing the city and its inhabitants with transportation * * *." (Stats. of 1913, pp. 1629, 1633.)

Here again it is significant that when the 1905 subdivision 25, *supra,* was amended in 1913 to grant express power to grant franchises all reference therein to "any contract in pursuance thereof", and to the requirement for making "provision by way of forfeiture * * * for efficiency of public service at reasonable rates" was **deleted.**

Despite the fact that subdivision 25 of section 2 of the charter of 1905, (which later, 1911, became subdivision 40 of the same section) was until 1913 obviously a limitation on the City rather than a grant of power, appellants attempt to draw an inference of a grant of power to the City to fix rates by contract from the language of that subdivision, as it existed prior to 1913, to the effect that "such grant and any contract in pursuance thereof shall provide" that the City shall have an option to purchase the property of the utility. It will be noted, however, that the phrase above quoted is from another part of the subdivision than that making any reference to rates. The portion of the subdivision with respect to rates reads:

> "Every grant shall specify the mode of determining any valuation therein provided for and the time and mode of payment, and shall make adequate provision by way of forfeiture of the grant or otherwise, to secure efficiency of public service at reasonable rates and the maintenance of the property in good order throughout the term of the grant." (Stats. 1905, p. 994.)

Appellants further seek to draw an inference that the power to fix rates by contract was granted by the last sentence quoted with respect to reasonable rates, on the grounds that the City had no power to regulate rates in 1905 when subdivision 25 was added and that, therefore, the requirement that every grant should make provision by way of forfeiture or otherwise to secure efficiency of public service at reasonable rates must have been a grant of power to contract for rates. In the first place, as we will soon show, the City had power to regulate rates since 1879 so the very basis of the contention does not exist. Furthermore, since the legislative intent is so unclear as to require such strained implications, the firmly established rule of construction for such grants, hereinbefore discussed at length, would require that the foregoing language be construed as a grant of power to regulate only. This Court has already so construed similar language. In Illinois, the statutes provided as follows:

> "The city * * * authorities * * * may contract with such incorporated company for a supply of water for public use, for a period not exceeding thirty years.
>
> "The City Council * * * shall have power to provide for a supply of water by the boring or sinking of artesian wells, etc., * * * and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years; * * *." (Freeport Water Co. v. Freeport (1901), 180 U. S. 586, 599-600.)

That this language might be construed either as granting the power to fix rates by contract throughout the term of the grant or to fix rates from time to time, that is, to regulate, was the holding of this Court in *Freeport*

Water Co. v. Freeport (1901), 180 U. S. 586, 600, where, after stating the fundamental rule of construction in such cases, it said:

> "* * * Our conclusion is that the powers conferred by the statutes of 1872 can, without straining, be construed as distributive. The city council was authorized to contract with any person or corporation to construct and maintain waterwords *'at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.'* The words,*'fixed by ordinance,'* may be construed to mean by ordinance once for all to endure during the whole period of thirty years; or by ordinance from time to time as might be deemed necessary. Of the two constructions that must be adopted which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice **to both parties** might require at a particular time."
>
> *Freeport Water Co. v. Freeport* (1901), 180 U. S. 586, 600.

Furthermore, the very basis of appellants' contention that the general language of subdivision 25 of the charter of 1905, *supra,* should be construed as a grant of power to contract for rates because the City had no power to regulate prior to that time, does not exist. The power to regulate public utility rates was granted to every municipal corporation in the state by section 11, Article XI of the state Constitution, adopted in 1879, which provides:

> "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

In defining the scope of this constitutional grant the supreme court of California has said:

> "Under this provision, every county, city, town, or township may adopt and enforce such constitutional police regulations as are not in conflict with general laws. It has the same power over its own local police and sanitary affairs as were formerly granted by the Legislature, and unless the exercise thereof will conflict with the operation of general laws, it may make and enforce the same through its local government."
>
> *Ex Parte Campbell* (1887), 74 Cal. 20, 23.

and, particularly as to Los Angeles, that

> "There is, of course, no doubt as to the possession by the municipality of Los Angeles of legislative power. By Section 11 of Article XI of the Constitution, * * * the people of the state 'have made a direct constitutional grant of the police power of the state to every municipal corporation for local purposes.'"
>
> *In re Pfahler* (1906), 150 Cal. 71, 80.[4]

And that this constitutional grant includes the power to regulate public utility rates is clearly indicated in *Denninger v. Recorder's Court* (1904), 145 Cal. 629, 631, where it was said:

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[4]See, also:

In re Isch (1917), 174 Cal. 180, 181-2;

In re Montgomery (1912), 163 Cal. 457, 459;

In re Smith (1904), 143 Cal. 368, 371;

Oddfellows' Cemetery Ass'n. v. San Francisco (1903), 140 Cal. 226, 230, 231;

Ex Parte McClain (1901), 134 Cal. 110;

De Baker v. Railway Company (1895), 106 Cal. 257, 283.

"By this section (Sec. 11, Article XI) the people have made a direct constitutional grant of the police power of the state to every municipal corporation for local purposes. It is conceded by the petitioner that the general grant of legislative power in the Constitution of a state includes the power to regulate gas rates by statute, and that this power may be delegated by statute to municipal corporations. If this is so, and if the regulation of gas rates by the state is an exercise of the police power, it would be difficult to say why, in the absence of more specific provisions in our Constitution relating to this matter, the municipal corporations of the state could not by virtue of the section above quoted adopt and enforce within their local limits ordinances as comprehensive, both as to the establishment of rates and the infliction of penalties, as the statutes which the Legislature is competent to enact for the state at large. But these are questions which we do not find it necessary to decide."

Denninger v. Recorder's Court (1904), 145 Cal. 629, 631.

and by the holding in *Ex Parte Lorenzen* (1900), 128 Cal. 431, 436, that an ordinance of the city of San Francisco regulating the issuance of street railway transfers was a valid exercise of the city's police power under section 11, Article XI of the Constitution.

Moreover, the charter of 1889 of the city of Los Angeles provided in Article III, section 29, that the city council

"shall, by ordinance, establish stands for hacks and other vehicles for hire, and regulate the charges of hacks and other vehicles carrying passengers for hire, and require a schedule of such charges to be posted in every such hack or other passenger vehicle." (Stats. 1889, p. 464.)

Could any doubt remain that section 11, Article XI of the Constitution invested municipalities with the power to regulate public utility rates it is at once dispelled by a reading of section 23, Article XII, as amended November 3, 1914,[5] whereby all political subdivisions of the state were expressly divested of **all** their powers respecting public utility **rates** but not of such of their **"powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates."** The continued powers are in the identical language of section 11, Article XI, *supra,* from which the power over rates is expressly excepted, indicating clearly that the enumerated powers otherwise would have included the power to regulate rates.

The record shows that all of the Company's 102 franchises, except 13, were granted between 1879 and November 3, 1914. [R. 388-91.]

It thus appears that from 1879 to November 3, 1914, the City had the power to regulate rates but that none of the above discussed enactments, from which appellants seek to derive a power in the city to contract as to such rates, contain any express grant of such power or even any language from which its existence could be fairly or reasonably implied.

Section 23, Art. XII, Constitution.

On November 3, 1914, section 23 of Article XII of the state Constitution was amended[5] to confer upon the Rail-

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[5]Section 23: "* * * The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California,

and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. From and after the passage by the Legislature of laws conferring powers upon the Railroad Commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this state, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the Railroad Commission; provided, however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, vested in any city and county or incorporated city or town as, at an election to be held pursuant to law, a majority of the qualified electors of such city and county, or incorporated city or town, voting thereon, shall vote to retain, and until such election such powers shall continue unimpaired; but if the vote so taken shall not favor the continuation of such powers they shall thereafter vest in the Railroad Commission as provided by law; and provided, further, that where any such city and county or incorporated city or town, shall have elected to continue any of its powers to make and enforce such local, police, sanitary and other regulations, other than the fixing of rates, it may, by vote of a majority of its qualified electors voting thereon, thereafter surrender such powers to the Railroad Commission in the manner prescribed by the Legislature; and provided, further, that this section shall not affect the right of any city and county or incorporated city or town, to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law. Nothing in this section shall be construed as a limitation upon any power conferred upon the Railroad Commission by any provision of this Constitution now existing or adopted concurrently herewith." (Stats. 1915, pp. lv-lvi.)

road Commission full power and jurisdiction to supervise and regulate public utilities and to fix rates of charges for their services:

> "Provided, however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, **other than the fixing of rates** * * * (until such powers are surrendered by the cities at an election).
>
> "* * * and provided, further, that this section **shall not affect** the right of any city and county or incorporated city or town, to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law."

The amendment also provided that the Legislature should confer the necessary powers upon the Commission, and this was immediately done by the re-enactment of the 1911 Public Utilities Act, so as to conform with the newly amended constitutional section. (Stats. 1915, p. 115.)

Appellants also place reliance upon this latter proviso but construed in the light of the new state policy of regulation this constitutional section, as then amended, clearly evidences a definite expressed purpose to divest all political subdivisions of the state of **all** their powers respecting the fixing of public utility rates. Such political subdivisions, not having theretofore had any power to fix public utility rates by contract, but only the power to regulate, it was of course unnecessary to make any reference in the amended section to the divesting of a power to contract. The proviso concerning franchises was added to the section, we submit, simply for the purpose of preserving to those cities (which might thereafter vote to

surrender to the Commission all their local, police, sanitary and other regulations) their power to grant public utility franchises to use the streets upon the terms and conditions, and in the manner prescribed by law. None of such political subdivisions, as we have shown, had ever been given the power to contract as to public utility rates, but only the power to regulate. Manifestly, then the insertion of this proviso in the amended section does not preserve to them a power they never possessed. Furthermore, the section cannot be construed to be a grant of power to the city of Los Angeles at all. The section itself provides that it **"shall not affect"** the rights of any city to grant franchises upon the terms and conditions and in the manner prescribed by law. This would as clearly negative any intent to confer powers upon the city as it would an intent to take them away. The section leaves the City whatever powers it might have had to contract for rates (which we have seen are none) but grants no such power.

Sec. 27, Public Utilities Act.

Finally, appellants rely upon section 27 of the Public Utilities Act as amended in 1915, which reads as follows:

> "No street or interurban railroad corporation shall charge, demand, collect or receive more than five cents for one continuous ride in the same general direction within the corporate limits of any city and county, or city or town, except upon a showing before the commission that such greater charge is justified; **provided, that until the decision of the commission upon such showing, a street or interurban railroad corporation may continue to demand, collect and receive the fare lawfully in effect on November 3, 1914.** Every street or interurban railroad corpo-

> ration shall upon such terms as the commission shall find to be just and reasonable, furnish to its passengers transfers entitling them to one continuous trip in the same general direction over and upon the portions of its lines within the same city and county, or city or town, not reached by the originating car." (Stats. 1915, pp. 115, 131.)

The proviso in this section allowing a street railroad corporation to continue to demand, collect and receive the fare lawfully in effect November 3, 1914, could, we submit, in no wise be construed as a grant of power to the city of Los Angeles to fix rates by contract. This section merely amounts to a legislative affirmance **to the companies** of the fares which had theretofore been fixed by political subdivisions; **a statutory fixing** of the fares in effect prior to the new section 23, Article XII of the Constitution which divested such political subdivisions of all their powers over rates. Under well established and familiar principles such fares would be subject to the exercise of federal injunctive powers when, as here, they became confiscatory and the Commission, after proper showing, denied relief.

II.

UNDER THE STATE CONSTITUTION THE LEGISLATURE CANNOT FIX PUBLIC UTILITY RATES BY CONTRACT NOR DELEGATE POWER TO THE CITY TO DO SO.

With the mass of legislation on the subject of public utilities, it would be hard to imagine any state where the people and the Legislature had so studiously avoided any enactment which might logically be construed to

grant to municipal corporations the power to fix public utility rates by contract. The reason for this striking absence of any such authority is not difficult to find.

The Bill of Rights of the people of the state of California expressly forbids unalterable privileges or immunities, where, in section 21, Article I of the state Constitution, it is provided that:

> "**No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the Legislature;** nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

That this section is not to be construed as a limitation upon the right therein reserved by the people, is clear from the further provision of said Bill of Rights that:

> "This enumeration of rights shall not be construed to impair or deny others retained by the people." (Sec. 23, Article I, Constitution.)

Municipal corporations are bound by the provisions of section 21, Article I of the Constitution, for it has been specifically held by the California courts that the powers of municipal corporations under section 11, Article XI, granting police powers to cities, is limited by said section 21, Article I.

In re Blois (1918), 179 Cal. 291, 294-5, it was held:

> "The source of the power of municipalities to enact ordinances of the general character of that here under review is to be found in article XI, section 11, of the state constitution, reading as follows:
>
> " 'Any county, city, town, or township may make and enforce within its limits all such local, police,

sanitary, and other regulations as are not in conflict with general laws.' In the exercise of the powers thus conferred the municipality is limited by the terms of article I, section 21 of the constitution, which provides:

"'No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.'"

In re Blois (1918), 179 Cal. 291, 294-5.[7]

Furthermore, all provisions of freeholders' charters such as the one under which the city of Los Angeles is governed are expressly subject to the Constitution, section 8 of Article XI providing:

"Any city * * * may frame a charter * * * consistent with and subject to this constitution * * *."

Since the people of California have so carefully forbidden irrepealable laws or uncontrollable privileges or immunities in their Bill of Rights and since the rights reserved to the people therein are, by express provision of the Constitution, not to be construed as limited to the enumerated rights, it is difficult to see how power to make irrevocable contracts could impliedly have been granted to the cities of California or how a charter provision (if any existed) granting such power would be consistent with the provisions of the Constitution.

Where such constitutional restrictions upon the power of the legislature to grant irrevocable privileges or im-

[7]See also:
Matter of the Application of Hines (1917), 33 Cal. App. 45, 47.

munities exist, the federal courts have held that in the absence of any state decision to the contrary franchise rates cannot be of any effect as a contract between the municipality and the utility.

It is a well established proposition in this Court that:

> "There can be no question in this Court as to the competency of a state Legislature, **unless prohibited by constitutional provisions,** to authorize a municipal corporation to contract with a street railway company as to the rates of fare, and so to bind during the specified period any future common council from altering or in any way interfering with such contract."
>
> *Detroit v. Detroit Citizens Street Ry. Co.* (1902). 184 U. S. 368, 382.

But where a state Constitution denies the power to the legislature to fix rates by contract or to delegate authority to do so to a municipal corporation the federal courts hold that even though there was an attempt to delegate such authority and an attempt by the municipal corporation to exercise the same, no contract resulted. Consequently, even though the state or its commission refused to raise the rates specified in franchise ordinances, the federal courts have enjoined the enforcement of such franchise rates, and have granted affirmative relief to the public utility.

The Texas Constitution, in section 17, Article I, contains the following language:

> "No person's property shall be taken, damaged or destroyed for, or applied to, public use without adequate compensation being made, unless by the consent of such person; and when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money; **and no**

> **irrevocable or uncontrollable grant of special privileges or immunities shall be made;** but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof."

This language was construed in *San Antonio v. San Antonio Public Service Co.* (1920), 255 U. S. 547, where the city of San Antonio had granted franchises providing for a 5¢ fare. When said fare became unremunerative, the city, which was the body having regulatory control of rates at the time, refused to allow an increase. The railway then filed a bill for injunction in the federal court to prevent the city from enforcing the 5¢ fare. The city moved to dismiss on the ground that the franchise fare constituted a binding contract obliagtion over which the court had no jurisdiction. The federal court held that because of the constitutional provision no contract at all existed with respect to the fare. This Court affirmed the granting of an injunction, saying:

> "Primarily the answer to that question must depend upon whether the ordinance of 1899, fixing the five cent rate, was a contract. That it was not and could not be, we are of opinion, is the necessary result of the provision of section 17, Article 1, of the state Constitution, existing in 1899, prohibiting 'any irrevocable or uncontrollable grant of special privileges,' etc., when considered in the light of the irrevocable and uncontrollable elements which must necessarily inhere in the ordinance of 1899 to give it the contract consequence relied upon."
>
> *San Antonio v. San Antonio Public Service Co.* (1920), 255 U. S. 547, 555.

The Constitution of Colorado provided:

> Article 2, Section 11: "That no * * * law * * * making any irrevocable grant of special

privileges, franchises or immunities, shall be passed by the General Assembly."

Article 15, Section 8: "* * * the police power of the state shall never be abridged * * *."

The city of Denver had granted franchises providing for a 5¢ fare. This fare became unremunerative and the company sought an injunction against its enforcement. The city moved to dismiss on the ground that the rates were set by contract. The Circuit Court of Appeals, in affirming the denial of the motion to dismiss, said:

> "We are also of the opinion that the city of Denver, or the city and county of Denver, never at any time possessed the power to enter into a contract with the tramway company whereby its power to regulate the fares of the company would be definitely suspended for any length of time."
>
> "The claim that the legislative power of the city and county of Denver is not subject to the provisions of the Constitution of Colorado is not supported by reason or authority."
>
> *City and County of Denver v. Stenger* (1922, C. C. A. 8th), 277 Fed. 865, 871, 872.

A similar result was reached under the Constitution of Louisiana, which provided:

> "The exercise of the police power of the state shall never be abridged nor so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state." (Constitution of Louisiana, Article 263.)

Under this provision the Federal courts held that neither the Legislature nor the city possessed power to fix an unalterable fare by contract.

O'Keefe v. City of New Orleans (1921, D. C., E. D. La.), 273 Fed. 560;

Affirmed: *City of New Orleans v. O'Keefe* (1922, C. C. A. 5th), 280 Fed. 92.

In the cases where it has either been held or assumed that the state legislature was unhampered by any constitutional restriction in granting authority to a city to set franchise contract rates there has always been a state decision so deciding prior to the question coming before the federal courts and such state decision was merely followed, *viz:*

Ohio:

City of Zanesville v. Zanesville Gas Light Co. (1889 Ohio), 23 N. E. 55, 59;

Cleveland v. Cleveland City Ry. Co. (1904), 194 U. S. 517, 534;

Columbus Ry. etc. Co. v. Columbus (1919), 249 U. S. 399, 407.

Michigan:

Pingree v. Michigan Central Ry. Co. (Michigan 1898), 76 N. W. 635, 636;

Detroit v. Detroit Citizens Street Ry. Co. (1902), 184 U. S. 368, 383.

Minnesota:

Ames v. Lake Superior etc. R. Co., 21 Minn. 241;

Minneapolis v. Minneapolis St. Ry. Co. (1910), 215 U. S. 417, 429-430.

Alabama:

Bessemer v. Bessemer Water Works (1907), 152 Ala. 391, 44 So. 663;

City of Opelika v. Opelika Sewer Co. (1924), 265 U. S. 215, 218-9.

Florida:

Southern Utilities Co. v. City of Palatka (1924), 86 Fla. 583, 99 So. 236, 241;

Southern Utilities Co. v. City of Palatka (1925), 268 U. S. 232, 233.

Minnesota:

Reed v. Anoka (1902), 85 Minn. 294, 297, 298, 88 N. W. 981;

St. Cloud Pub. Serv. Co. v. St. Cloud (1924), 265 U. S. 352.

Kentucky:

Paducah v. Paducah R. Co. (1922), 261 U. S. 267, 270.

"On the argument, it was stated by counsel that the city and company have power to contract as to rates, and we so assume."

III.

IN CALIFORNIA THE GRANT OF A FRANCHISE IS A LEGISLATIVE FUNCTION AND WHERE, AS HERE, NO GRANT OF AUTHORITY TO FIX RATES BY CONTRACT EXISTS, FRANCHISE FARE PROVISIONS CANNOT OPERATE BY WAY OF CONDITION OR ESTOPPEL.

As the following decisions will show, the granting of a franchise is legislative in character and any condition imposed therein with respect to which the city had no legislative power is void and of no effect between the city and the grantee. If it is a bond, the bond is without consideration and unenforcible. If it is a rate provision, the rate provision is likewise unenforcible. Furthermore,

no rights can be gained by a municipality nor obligations imposed upon the grantee by reason of the fact that the franchise was required to be accepted in writing, or was voluntarily assumed, or by any element of estoppel.

In *South Pasadena v. Los Angeles Terminal Railway Company* (1895), 109 Cal. 315, 320, one of the conditions prescribed in the franchise ordinance to the defendant railroad, which said franchise was accepted in writing by the utility, was that the rate of fare to Los Angeles should never exceed twenty-five cents. The city of South Pasadena attempted to enforce this condition, but was unsuccessful, the court saying:

> "And if, as claimed by respondent, the case is one of mere contract obligation, then we think it clear that some grant of authority mediately through the legislature—and this would be of doubtful constitutionality—or immediately through the constitution, from the people of the state, either in express terms or by necessary implication, must be exhibited to warrant such a contract; * * *"
>
> *South Pasadena v. L. A. Terminal Railway Co.* (1895), 109 Cal. 315, 320.

In *City of Arcata v. Green* (1909), 156 Cal. 759, 762-5, the city had power by statute "to permit under such restrictions as they may deem proper, the laying of railroad tracks and the running of cars drawn by horses, steam or other power thereon". The city passed an ordinance granting the defendants a franchise to use particular streets in the city upon certain "express conditions" including maintenance of pavement, starting work on the electric line between Eureka and Arcata within ninety days, the giving of a bond, and others. The ordinance required the grantees, within thirty days, to file their

written acceptance of the franchise and the conditions, and they did so. Construction not having been begun within the ninety day period, the city began action on the bond. The state supreme court said:

> "We are still confronted with the question whether the conditions attached to the grant, and incorporated in the bond, were such as the city had the power to impose. In this connection, we do not overlook the allegation that the bond was voluntarily given by the appellants. But, reading the allegation in connection with the averments showing that the giving of such bond was a condition upon which the trustees, by their ordinance, made the grant of the franchise depend, it means no more than that the grantees accepted the franchise upon the only terms available to them. * * * As between private individuals or corporations, having a general power to make contracts, this would undoubtedly have constituted an agreement binding upon the parties to it. Here, however, one of the parties to the alleged contract was a municipal corporation. As such, it had only such powers as were expressly or by necessary implication conferred upon it by the constitution or by statutes passed under the constitution. (Herzo v. San Francisco, 33 Cal. 134; *Ex parte* Frank, 52 Cal. 608 (28 Am. Rep. 642); McCoy v. Briant, 53 Cal. 250; South Pasadena v. Terminal Railway Co., 109 Cal. 315 (41 Pac. 1093).) Section 862 of the Municipal Corporation Act, the only law relied on by appellant as the source of the power to grant the franchise, authorizes the city trustees to permit the laying of tracks, etc., 'under such restrictions as they deem proper'. Conditions may be attached to the grant. But the power to make such grant, and to impose conditions upon it is 'legislative in its nature; * * * and is not referable for its support to the power of making contracts'. (South Pasadena v. Terminal Ry. Co., 109 Cal. 315 (41 Pac. 1093).) Unless the condition or 'restriction' was one within the scope of the legislative power of the municipality, it cannot be

supported as a contract. (City of Aberdeen v. Honey, 8 Wash. 251 (35 Pac. 1097).) That it was not within such scope is, we think, a necessary conclusion from the doctrines declared in the South Pasadena case, already cited. * * *

* * * * * * * * * *

"The appellant urges that the defendants, having received the grant which they sought, are estopped to deny the validity of their undertaking which they gave in consideration of such grant. But we think the doctrine of estoppel has no just application here. A party contracting with a city regarding a subject-matter within the scope of the city's powers may, where he has received the benefit of the contract, be precluded from asserting that the contract was not, on the part of the city, executed in the manner required by law. The doctrine, however, cannot be made to cover contracts entirely beyond the range of the municipal authority. **'If this doctrine be established, then corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers on them which the legislature has withheld. A proposition so erroneous can scarcely need argument to overturn it. * * * We cannot apply the doctrine of estoppel to such a case as this.'** (City Council v. Montgomery etc. Co., 31 Ala. 76.)

City of Arcata v. Green (1909), 156 Cal. 759, 762-4.

San Francisco v. Spring Valley Water Works (1874), 48 Cal. 493, 529, arose out of a grant by the state to use streets on certain conditions, such as that the grantee might under named circumstances charge more than the general law allowed for water. The court held this was not a grant of property by the state but the giving of a franchise in its governmental capacity, saying:

"A private person can certainly grant to a corporation a right of way over his land * * * upon such terms and conditions as may be agreed upon. It is equally true that the state, in its capacity of a proprietor of lands, may do the same thing. It may, in that capacity, grant to a railroad corporation a right of way over lands belonging to the state, on such terms and conditions as it sees fit to impose. In these cases it is merely a matter of contract between parties capable of contracting, in respect to certain rights of property. But the state has no proprietary interest in the streets of a city, dedicated to public use. In its capacity as a sovereign, it may regulate the use, or abolish it altogether. (Polack v. San Francisco Orphan Asylum, 48 Cal. 490.) But, as a general rule, the fee is in the owners of the adjoining lands on each side to the center of the street, and the state can only regulate and control the easement which the public has over the land. When the state grants to a private corporation an easement over the streets, not common to the public at large, it acts in its sovereign capacity * * *"

San Francisco v. Spring Valley Water Works (1874), 48 Cal. 493, 529.

Town of St. Helena v. Ewer (1914), 26 Cal. App. 191, 195-7, involved a franchise ordinance granted under the provisions of section 19, Article XI of the state Constitution, after advertisement and bids. A condition of the ordinance was payment by the grantees of a percentage of gross receipts. The grantees accepted the grant in writing and the city sought to collect the percentage of receipts attempted to be contracted for. The court found that there was no power in the city to make such a condition to the grant, and said:

"It is further contended that * * * the bidder for a franchise has the right, independently of the

statute, to enter into a private contract with the trustees of the town on terms proposed by or agreeable to him. Appellant still further contends that conceding the contract to pay the claim here made to be **invalid,** it is not **illegal** or **unlawful** and hence defendant is estopped to dispute its validity. * * * (p. 195. Italics by court.)

"The contention that the claim may be enforced as the subject of private contract between Ewer and the town cannot be maintained. The facts alleged show beyond dispute that in dealing with the public, as respondent points out, the municipality was acting in its legislative capacity and that its action is not referable, for its support, to the power of making contracts. In City of South Pasadena v. Los Angeles etc. Co., 109 Cal. 315 (41 Pac. 1093), the court said: 'The streets of a city are held as corporate or municipal property and are not subject to the power of contractual disposition, like the property of an individual.' Plaintiff cannot avoid the restraining effect of the constitution by attempting to convert its legislative acts into the contracts. The essence of the ordinance is found in the grant of a franchise for the use of the streets of St. Helena to supply the town and its inhabitants with water, which is purely a legislative act. We cannot escape the fact that the grant was made on condition that the grantee pay for the privilege granted—a condition, as we have seen, which is beyond the power of the municipality to impose. It is no answer that defendant voluntarily entered into the engagement. In its legal sense his acceptance was not voluntary for the reason that his bid would not, nor could that of any other person, have been received without agreeing that he would pay at least three per cent of his gross annual receipts. In fact, probably under the spur of competition, defendant Ewer bid seven and seven-eighths per cent. In the Arcata case, which was an action to recover on a bond given in connection with a grant to build an exclusive railroad, the court said: 'We do not overlook the allegation that the bond was voluntarily

given by the appellants. But, reading the allegation in connection with the averments showing that the giving of such bond was a condition upon which the trustees, by their ordinance, made the grant of the franchise depend, it means no more than that the grantees accepted the franchise upon the only terms available. They consented to furnish the undertaking, but their consent was required in order to enable them to take any benefit under the grant.' Nor do we think the plea of estoppel available to plaintiff. The town had no power to impose the condition that the bidder should pay a per cent of his gross annual earnings. * * *" (pp. 196-7.)

"The town of St. Helena had no authority to require the grantee of a franchise to pay any part of the gross proceeds of the franchise as a condition to its enjoyment. 'There is here no reason for the application of the doctrine of estoppel.' (Foxen v. City of Santa Barbara, 166 Cal. 77, 83 (134 Pac. 1042, 1045).)"

Town of St. Helena v. Ewer (1914), 26 Cal. App. 191, 195-6-7.[8]

As the supreme court of California has pointed out, if the doctrine of estoppel were allowed in such cases municipal corporations "have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers on them which the legislature has withheld. A proposition so erroneous can scarcely need argument to overturn it * * *." (*City of Arcata v. Green, supra,* 156 Cal. 759, 764.)

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[8]See also:

People v. Dean (1898), 122 Cal. 421, 423;

San Francisco-Oakland Terminal Rys. v. County of Alameda (1924), 66 Cal. App. 77, 81, 83.

The federal cases likewise support the proposition that if a city has no power to fix rates by contract, the provisions of a franchise ordinance purporting to do so are no bar to the court enjoining the enforcement of confiscatory rates.

Thus in *San Antonio v. San Antonio Public Service Co.* (1920), 255 U. S. 547, 556, counsel for the city, in resisting the suit for an injunction against the enforcement of the franchise rate brought by the public utility argued that "although no contract was possible under the constitutional restriction which would bind the city not to lower the rate, nevertheless there was a unilateral contract or condition resulting from the granting of the franchise which bound the railway company to the franchise rate, * * *" This Court dismissed this contention on two grounds, stating:

> "There is not the slightest suggestion of any attempt on the part of the parties consciously to produce such a condition. But besides, the error underlying the proposition is not far to seek. The duty of an owner of private property used for the public service to charge only a reasonable rate, and thus respect the authority of government to regulate in the public interest, and of government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal. Where, however, the right to contract exists and the parties, the public, on the one hand, and the private owner, on the other, do so contract, the law of the contract governs both the duty of the private owner and the governmental power to regulate. Were, therefore, as in the case supposed in the argument, the regulating power of government wholly uncontrolled by contract, it would follow that that power would be required to be exerted, and hence the supposed condition operat-

ing upon the private owner would be nugatory. Such a case really presents no question of a condition, since it resolves itself into a mere issue of the exrcise by government of its regulatory power."

San Antonio v. San Antonio Public Service Co. (1920), 255 U. S. 547, 556.

In *City of New Orleans v. O'Keefe* (1922, C. C. A. 5th), 280 Fed. 92, 94, the receiver for the utility was seeking an injunction in the federal courts against the enforcement of franchise fares. The municipality advanced the argument on appeal "that the maintenance of the rate of five cents was a condition to the grant, and continued use, of the franchises to occupy the streets." The court denied the proposition and the injunction was granted.

In *City and County of Denver v. Stenger* (1922, C. C. A. 8th), 277 Fed. 865, the city had attempted to set a franchise rate of five cents. The receiver of the railway filed a bill for an injunction in the Federal court against the enforcement of the franchise rates. In granting the injunction the court said that even if the language employed in the franchise had been contractual, it would be unilateral and unenforceable because of "lack of mutuality".

It is suggested in the briefs of appellants that a requirement that franchises be sold and bids accepted would indicate that the provision with respect to fares was a part of the bid or consideration for which the franchise was granted. The California supreme court has expressly negatived this contention in holding that the only element comprised within the term "bid" is the cash price paid to the grantor for the franchise.

Thus in *Thompson v. Board of Supervisors* (1896), 111 Cal. 553, 557-8, where, under the Franchise Act of 1893, the plaintiff bid for an electric railway franchise, agreeing to pay $25 and to furnish power and light, and give 2% of gross income. The county rejected his bid and he sought mandate claiming to be the highest bidder. In refusing the writ, the court said:

> "When the law says a franchise must be sold to the highest bidder, without stating other terms or conditions of sale, it means sold for cash. It does not contemplate that it may be bartered away for meats and produce to feed the inmates of the county infirmary, or traded off for horses to be used in the fire department of the municipality. The moment you give a construction to the law by which the officers selling may accept a consideration for the franchise in any other commodity than money, the whole purpose and object of the act becomes a nullity, * * *. It would thus seem that petitioner's offer to furnish power for the county infirmary, and erect clusters of electric lamps at twenty different points upon the road, cannot be considered; for the officers intrusted with the sale had no more right to accept such properties and benefits in consideration of the franchise than they had to accept horses, cattle, or sheep. We are also clear in holding that an agreement to pay a percentage of the gross receipts of the road, after completion and when in operation, cannot be received as a legal bid or tender under this act. As already suggested, when a statute provides that property shall be sold to the highest bidder, in the absence of anything in the statute to the contrary, it must be held to mean 'to the highest bidder for cash.'"
>
> "* * * the statute contemplates a cash sale, and a percentage of gross receipts is in no sense cash."

Thompson v. Board of Supervisors (1896), 111 Cal. 553, 557-8.

IV.

THE FARE PROVISIONS OF THESE FRANCHISES EVINCE AN INTENTION TO REGULATE, NOT TO CONTRACT.

Even in those cases where the undoubted power exists in a municipality to fix public utility rates by contract, the courts will closely scrutinize the language used in fixing the rates for the purpose of determining whether it was the clear intent of the city that such rates should remain unchanged throughout the period of the franchise, or should be subject to the further exercise of the police power of the city. In other words, whether it was the clear intent of the city to bind its future legislative bodies by contract regardless of changed conditions or whether its intention was merely to regulate the rates.

The record here shows [R. 387-397] that of the 102 franchises under which the Company operates on the streets of the city of Los Angeles,

Eighteen (18), designated in the record "Class A", contain the following fare provision:

> "The rate of fare to be charged under this franchise **shall not be more than five cents** for one continuous ride in the same general direction within the corporate limits of the city, except upon a showing before a competent authority having jurisdiction over rates of fare, that such greater charge is justified." [R. 367.]

Seventy-three (73), designated in the record "Class B", contain the following fare provision:

> "That the rate of fare for any distance over said road or its branches, one way, **shall not exceed five cents** for one passenger." [R. 387.]

Five (5), designated in the record "Class C", contain no fare provision. [R. 387.]

Three (3), designated in the record "Class D", contain the following fare provision:

> "That the rate of fare charged **shall not exceed two and one-half cents per mile for any distance; provided, however, that no fare need be less than five cents.** [R. 387.]

Two (2), designated in the record "Class E," contain the following fare provision:

> "That the rate of fare for passengers on said **railroad shall never exceed ten cents. The said Board of Supervisors reserving the right to establish at any time, a fare not exceeding ten cents, and not less than five cents."** [R. 388.]

One (1), designated in the record "Class F", contains the following fare provision:

> "That the rate of fare for passengers on said railroad **shall never exceed three cents per mile."** [R. 388.]

All of the above 102 franchises were granted subsequent to 1879, when section 21 of Article I of the state Constitution prohibiting the granting of special privileges or immunities, and section 11 of Article XI empowering cities to regulate rates, became effective. Of these 102 franchises a total of 22 composed of the 18 so-called "Class A" and 4 of the so-called "Class B" franchises were all granted by the city of Los Angeles subsequent to November 3, 1914, the date of the adoption of the present section 23 of Article XII of the Constitution, *supra,* expressly divesting all political subdivisions of the state of all powers over public utility rates.

In determining whether the above quoted fare provisions evince a clear intention upon the part of the grantors that both they and the grantee company shall be bound throughout the duration of the franchise by the rate therein fixed, we can only turn to the decisions of the courts of other jurisdictions in analogous cases for such language has never received judicial interpretation in California.

In *Rogers Park Water Co. v. Fergus* (1901), 180 U. S. 624, 629-630, the town of Rogers Park had granted franchises to the water company by ordinances. Section 12 of the ordinances provided:

> "The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise, * * *."

Then followed the rates for the particular purpose for which the water might be used. Then followed a provision that the

> "rates for all other purposes that may be applied for, not named in the foregoing schedule of maximum rates, will be fixed by estimation or meter at the option of the grantee or assigns."

This Court held that:

> "This, it will be observed, is the language of command, not of contract; of limitation on power, not of bargain-giving power. The right to charge the inhabitants of the village for the water supplied to them resulted from the right to construct and maintain the system. Section 12 was a regulation of the right. There is no stipulation that it will be the only instance of regulation; that the power to do so is bartered away; and that the conditions which determined and justified it in 1888 would remain standing, and continue to justify it through the

changes of thirty years. It would require clearer language to authorize us in so holding."

Rogers Park Water Co. v. Fergus (1901), 180 U. S. 624, 630.

In *City & County of Denver v. Stenger* (C. C. A. 8th, 1922), 277 Fed. 865, 867, 868, 870, the city of Denver had granted to the railway company by ordinances two rights-of-way and a franchise along certain streets. Each of the right-of-way ordinances provided, with slight variation in language, that **"the said company shall not be entitled to receive more than five cents for a single passage on any line of the said company's railway within this city,"** and the franchise ordinance limited the fare to **"five cents, and no more."** The Circuit Court of Appeals for the Eighth Circuit found that this language was not intended to be contractual and that if it was, it was unenforceable because it was unilateral and lacked mutuality.

In *Knoxville Water Co. v. Knoxville* (1903), 189 U. S. 434, 436, the city of Knoxville, by ordinance, granted to the Knoxville Water Company a franchise which provided that "said company will supply private consumers with water at a rate **not to exceed five cents** per 100 gallons." (The similarity in language to the franchises here is to be noted.) This Court said that, assuming that the charter of the city authorized it to contract, this did not amount to a contract, for it was among the undertakings of the company only, the city promising nothing. Therefore, an ordinance lowering the water rate was upheld both in the Tennessee courts and in this Court.

In *County of Stanislaus v. San Joaquin & Kings River Canal etc. Co.* (1904), 192 U. S. 201, 208, a franchise had been granted by the legislature of the state of California, 1862, providing therein that the rates to be charged by the water company should be subject to regulation by the Board of County Supervisors, but "shall not be reduced by the supervisors so low as to yield to the stockholders less than 1½ per cent per month upon the capital actually invested". Later, the legislature authorized the supervisors to fix rates to yield 6 per cent to 18 per cent upon the capital investment and the supervisors reduced the rates of the company so as to produce a yield of only 6 per cent. The company sought to enjoin the 6 per cent rate ordinance on the ground that it impaired its contract, but the bill was dismissed. This Court said:

> "In our belief, the language of the act of 1862 does not and was not intended to form a contract, but simply amounted to the statement of the then pleasure of the legislature, to so remain until subsequently altered by it."
>
> *County of Stanislaus v. San Joaquin & Kings River Canal etc. Co.* (1904), 192 U. S. 201, 208.

In the light of these decisions it would seem clear that by the use of the language contained in the Company's franchises the legislative bodies of the grantors did not intend or contemplate the bartering away of their reserve police power for the duration of the franchises, but rather that they had in mind and intended only the regulation of the charges and the preservation unto their succeeding legislative bodies of the continued right to regulate said charges.

It is to be noted, also, that of the 102 franchises under which the Company occupies the City's streets 25 were granted by the Board of Supervisors of Los Angeles County, and that of the 20 franchises stressed by the Commission as having been granted between 1905 and 1911 no less than 14 were granted by the county, and not by the City. [R. 396.]

V.

THE COMMISSION HAS TWICE EXERCISED JURISDICTION OVER THE COMPANY'S FRANCHISE FARE.

In the face of this total lack of power in the City to fix the Company's fare by contract, we submit that it is of no moment whether the court below may have erred in its view that the 1921 decision of the Commission increasing the 5¢ fare to 6¢ abrogated the franchise fare even though the 6¢ fare was never charged or collected. We do not concede that such view was erroneous but contend that, the City having no power to contract as to public utility rates, the 5¢ fare provisions of appellee's franchises are not and cannot be contract obligations, and that therefore it is immaterial, so far as the power and jurisdiction of a federal court to relieve confiscation is concerned, whether those fare provisions were or have been abrogated by the Commission, because the record shows that the Commission, being properly appealed to, and upon a clear showing of confiscation, has arbitrarily refused to authorize compensatory rates.

Our contentions below on this question were, as they now are, twofold: First, that even assuming the franchise fare provisions constitute contract obligations, the

Commission, by its decision No. 9029 in 1921, abrogated that obligation by finding the 5¢ fare inadequate and authorizing a 6¢ fare; and secondly, that, there being no power in the City to contract as to public utility rates, the 5¢ fare was not a contract obligation and consequently the Commission, by its decision No. 19521 in 1928, had exercised its complete jurisdiction over said fare and, by denying any increase, had deprived the Company of its rights under the federal Constitution. We first took this position in opposition to reasons (f) and (g) of the Commission's motion to dismiss [R. 243-4] and we now adhere to it. A careful analysis of the opinion of the court below clearly discloses that it too caught the distinction, for, after holding that none of the statutes cited to it by the appellants contained any grant of power to contract, that court said [R. 541-542 and 543]:

> "* * * No decisions of the Supreme Court of the state directly decide the question, and we pass it, merely saying that **we are inclined to the view that in the absence of an express grant to the city of power to fix binding rates in franchises, no such power exists: nor can it be implied under the language of the act of 1901, or other statutes called to our attention.** (Stanislaus County v. San Joaquin and K. R. Canal Co., 192 U. S. 200; City of San Antonio v. San Antonio Public Service Co., 255 U. S. 547; San Francisco Oakland Terminal Co v. City of Alameda, 226 Fed. 889; Knoxville Gas Co. v. City of Knoxville, 261 Fed. 283.) It is perfectly clear, we think, that at least since the adoption of the constitutional provision heretofore cited, any provision with respect to rates in franchises granted since 1914 could not be considered as binding contracts of inviolable nature. * * * [R. 541-2.]
>
> "We prefer to rest our decision upon the ground that **even upon the assumption** that the city had

power to fix the utility rate by contract and that the rate provisions contained in the franchises granted to plaintiff did constitute contracts, nevertheless, the rates specified in the provisions of the franchises **have been changed by the exercise of the police power of the state.** It appears that in 1921 the Commission granted plaintiff company authority to increase its rates over the basic five cent fare which was then in force. There were in force and effect at that time 102 out of 116 franchises granted to plaintiff or its predecessors. Since May, 1921, fourteen other franchises have been granted. When the Commission in 1921 made its order changing the basic five cent fare, it authorized plaintiff to file with the Commission and put into effect thirty days from the date of the order, a schedule of rates increasing the then present basic fare of five cents to six cents, and directed that tickets or token be put on sale. That plaintiff company did not avail itself of the right to the increase does not affect the fact that the Commission exercised its exclusive jurisdiction to regulate rates by making and finding that the rates provided for in the franchise granted to plaintiff were inadequate, and that the six cents fare authorized was a just rate. * * * [R. 542-3.]

"Furthermore, we are of the opinion that the proceeding before the Railroad Commission (No. 13323) out of which the present suit grew, must be held to have been **a complete exercise by the Commission** of its power over the rate specified in the franchises granted to plaintiff. How could it be otherwise? The Commission received and considered original and supplemental applications for an increase made by plaintiff. It carried on an extensive investigation lasting from November, 1926, until March, 1928, when it made its finding that the five cent fare allowed to plaintiff was not an unreasonable return, and that under that rate and the method of operation for the year ending December 31, 1927, the return was approximately 4.9 per cent. The finding of the Commission rested upon detailed figures concerning the valuation of plaintiff's prop-

erty. The practical result of the conclusion and order of the Commission was to prevent the company from obtaining a fair return upon its property invested in the public service. Its order was none the less effective in denying permission to raise an existing rate inasmuch as the necessary effect was to enforce the existing rate, which would effect confiscation of plaintiff's property. (Miss. R. R. v. M. & O. R. R., 244 U. S. 388.) [R. 543-4.]

"We, therefore, hold that the denial of permission to raise the existing rate, followed as it was and is by the necessary effect of enforcing the rate, was an exercise of jurisdiction and that a situation was created wherein the power of the federal court to enjoin, if confiscation is effected by the order, is ample. * * *" [R. 544.]

We still press the points.

(a) DECISION No. 9029 (1921).

When a state regulatory body, by its order, allows a fare other than that fixed in a franchise contract, the order permanently abrogates such franchise fare just as effectively " 'as if, after fixing the rates, there had been added therein the words 'and it is hereby directed that the rates provided in the franchise shall be and they are hereby terminated' or words of similar import.' " (*Denney v. Pac. Tel. & Tel. Co.* (1927), 276 U. S. 97, 103.) Consequently, even if the fare provisions of the Company's franchises did constitute contract obligations, they ceased to be such at the time of the signing and filing of the Commission's Decision No. 9029 on May 31, 1921.

The record here shows that in November, 1918, the Company applied to the Commission for an investigation of its service and financial conditions. After an extended investigation covering a period of almost 3 years, the

Commission handed down its Decision No. 9029[9] on May 31, 1921, in which, among other things, it found that:

> "If adequate street railway service is to be given in Los Angeles, there appears to be no possibility for the company to secure the necessary revenue under a continuation of the flat 5 cent fare. An increase in the fare in some form, we are satisfied, should be authorized if street railway service is not to suffer and great injury is not to result to the development of the city." [R. 170.]

and issued its order authorizing the Company to charge a 6 cent fare with 10 tokens or tickets for 50 cents. [R. 169.] The Commission's order in said decision provided as follows:

> "5. In the matter of rates.
>
> "That applicant is hereby authorized to file with the Commission and put into effect within thirty (30) days from the date of this order a schedule of rates increasing the present basic 5-cent fare to 6-cents, [R. 348] provided that tickets or tokens be put on sale at the company's offices, on the company's cars, and at such other points as the company may select, in blocks of ten (10) tickets or tokens at a total cost of 50 cents for each block; and provided further that the single 6 cent fare, as also the reduced rate ticket or token fare, shall retain transfer privileges as at present in existence. The reduced ticket or token fare shall be transferable and good at any time, but the company shall not be required to redeem unused tickets or tokens." (19 C. R. C. 1002.)

For the reasons stated in the complaint herein [R. 12] the Company never filed the 6 cent schedules and the 6

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[9]Opinions and Orders of the Railroad Commission of California, Vol. 19, p. 980 (19 C. R. C. 980). *Re* Los Angeles Railway Corporation (1921), P. U. R. 1922 A, 66.

Utilities Act of California (Stats. 1915, p. 115); a "showing before the Commission that such greater charge is justified" (Sec. 27); a determination of the just and sufficient fares and a fixing of the same by order (Sec. 32a); and "a showing before the Commission and a finding by the Commission that such increase is justified" (Sec. 63a).[10]

As was said in *Denney v. Pac. Tel. & Tel. Co.* (1927), 276 U. S. 97, 102:

> "**The department made its investigation and order without regard to the franchise rates and treated the questions presented as unaffected thereby.** It exercised the power and duty to fix reasonable and compensation rates irrespective of any previous municipal action. We must treat the result as a bona fide effort to comply with the local statute." (*Denney v. Pac. Tel. & Tel. Co.* (1927), 276 97, 102.

And the effective date of that decision and order was May 31, 1921, the date it was issued, and not as the Commission contends, thirty days later. The thirty day provision, as the order itself clearly shows, was simply the limit of time within which the Company might file its new schedules. The decision and order was effective May 31, 1921, and the 6¢ fare would have been charged and collected long before the expiration of 30 days therefrom had the Company not asked a rehearing. Under Sec. 66 of the Act, therefore, the decision and order was

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[10] Just how full and complete was this exercise of jurisdiction by the Commission will appear from the full text of said Decision No. 9029 in P. U. R. 1922A, 66. The order accompanying said decision is, however, not reported there.

cent fare was never charged or collected. On October 26, 1926, just prior to the filing of the Company's application for the present increase with the Commission, the Commission, at the request of the Company, dismissed said application of November, 1918, and revoked and set aside said Decision No. 9029.

Regardless of why said 6 cent fare was never charged or collected and regardless of the fact that said decision and order of the Commission was revoked and set aside some five years later at the request of the Company, here, we submit, was a full and complete exercise of jurisdiction by the Commission abrogating the 5 cent franchise fare. The moment that Decision No. 9029 had been filed by the Commission its jurisdiction had been completely exercised in so far as the adequacy and reasonableness of the 5 cent franchise fare was concerned. It had formally found the 5 cent fare to be inadequate and had in effect formally abrogated it in favor of a basic 6 cent fare. If any of the Company's franchises contained a contract restraining such increased fare, such restraint would have to be removed before the fares could become effective. But this restraint was removed by the decision and order of the Commission, for the Commission had done every act and made every order necessary to make effective a six cent fare, consequently its order must necessarily have abrogated any five-cent contract fares if they existed. No slightest additional act or step on the part of the Commission was necessary to put the 6 cent fare in effect but only the action of the Company in filing and posting its new 6 cent schedules.

Here, we submit, was a complete compliance by the Commission with all its requisite duties under the Public

in full force and effect until June 20th, when the petition for rehearing was filed. At the date of that decision the Company had in force and effect all but 13 of its present 102 franchises, and of the 13 granted since May 31, 1921, all except one is a so-called Class A franchise containing a limited 5¢ fare provision, and the excepted one is a so-called Class C franchise containing *no* fare provision. [R. 394-7.]

It thus appears that the unlimited 5¢ fare clause contained in all of the Company's so-called Class B franchises was effected by the Commission's said decision No. 9029, and that, whether said 5¢ fare provisions constituted binding contract obligations or not, they were abrogated and increased to 6 cents by said decision.

(b) DECISION No. 19521 (1928).

The action of the Commission in the proceeding which gives rise to the case at bar likewise constituted a complete exercise of jurisdiction by the Commission over the 5¢ fare.

In that proceeding the Commission received and entertained both the Company's application for a 7¢ fare and its interim application for a 6¢ fare; it conducted thereon an extensive and prolonged investigation extending over a period of almost a year; it had all the evidence under submission for approximately eight months, and never in the course of all that time nor at any stage of the proceeding was the question of a contract fare even suggested or mentioned, and finally in the face of a most convincing showing of confiscation the Commission found that although the 5¢ fare afforded the Company a return of only 4.9% it was not unreasonable, and denied the Company any relief.

The record here presents the unprecedented situation of a public utility whose property upon every theory and estimate of valuation in the record before the state regulatory agency is being confiscated by the compulsory collection of the 5¢ fare; a public utility which, following the only course available to it under the state law, has appealed for relief on no less than two occasions within the last three years to the one and only agency of the state authorized and empowered to grant it relief; whose repeated appeals to that agency have met with rebuff and a refusal of relief—**not on the ground that the 5 fare was a contract fare over which that agency had no jurisdiction**—but upon the sole ground that although according to its own figures such fare afforded a return of only 4.9%, it was not unreasonable, even though according to all of that agency's own figures the confiscation of that utility's property is, and for some years has been, apparent.

Section 32[11] of the Public Utilities Act of California expressly enjoins upon the Commission the duty to deter-

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[11]Sec. 32, Public Utilities Act of California. "(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates, fares, tolls, rentals, charges or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, practices or contracts, or any of them, affecting such rates, fares, tolls, rentals, charges or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in anywise in violation of any provision of law, or that such rates, fares, tolls, rentals, charges or classifications are insufficient, the commission shall determine the just, reasonable or sufficient rates, fares, tolls, rentals, charges, classifications, rules, regulations, practices or contracts to be thereafter observed and in force, and shall fix the same by order as hereinafter provided." (Stats. 1915, p. 132.)

mine just, reasonable and sufficient rates or fares, and to fix the same by order. Yet it is here argued by appellants that when the Commission, although properly and regularly appealed to, ignores that duty and refuses to fix just, reasonable and sufficient rates, the utility is without remedy and the federal courts are powerless to grant relief because, forsooth, the rate is alleged to be fixed by contract.

In the absence of any express grant of power to the City to contract away the regulatory powers of the state—and there is no such grant here—such an argument, we submit, cannot prevail in the light of the repeated declarations of this Court and of other federal courts in the following cases:

In *Mississippi R. R. Commission v. Mobile & Ohio R. R. Co.* (1917), 244 U. S. 388, 391-2, it was said:

> "This power of regulation, if it is exercised in such an arbitrary or unreasonable manner as to prevent the company from obtaining a fair return upon the property invested in the public service, passes beyond lawful bounds and is void, because repugnant to the due process of law provision of the Fourteenth Amendment to the Constitution of the United States. Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, *supra;* Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 35 Sup. Ct. Rep. 961; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L. R. A. ....., ..., P. U. R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1.
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> "Whether a statute enacted by the Legislature of a state or an order passed by a railroad commission, exceeds the bounds which the law thus sets to such authority, is a question of law arising on the facts of each case (Mississippi R. Commission v. Illinois C. R. Co., 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct.

Rep. 90), and the appropriate remedy for determining that question is a bill in equity such as was filed in this case to enjoin its enforcement. *Ibid.;* Chicago, M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491, 59 L. ed. 1423, L. R. A. 1916A, 1133, P. U. R. 1915D, 706, 35 Sup. Ct. Rep. 869."

Miss. R. R. Commission v. Mobile & Ohio R. R. Co. (1917), 244 U. S. 388, 391-2.

In *Northern Pac. Ry. Co. v. Dept. of Public Works of Wash.* (1925), 268 U. S. 39, 44-5, this Court held:

"But where rates found by a regulatory body to be compensatory are attacked as being confiscatory, courts may inquire into the method by which its conclusion was reached. An order based upon a finding made without evidence * * * or upon a finding made upon evidence which clearly does not support it * * * is an arbitrary act against which courts afford relief."

Northern Pac. Ry. Co. v. Dept. of Public Works of Wash. (1925), 268 U. S. 39, 44-5.

In *Smith v. Illinois Bell Telephone Co.* (1926), 270 U. S. 587, 591, it was held:

"Property may be as effectively taken by long continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them; * * *."

Smith v. Illinois Bell Tel. Co. (1926), 270 U. S. 587, 591.

In *Augusta-Aiken Ry. & Elect. Corp. v. Railroad Commission of So. Caro.* (C. C. A. 4th, 1922), 281 Fed. 977, 980, the Circuit Court of Appeals said:

"It is not the fixing but the enforcement of a confiscatory rate that invades the constitutional rights of the carrier. To deny permission to raise an

existing rate is in necessary effect to enforce that rate, and obviously confiscation may be as completely effected by refusing an increase as by requiring a reduction. It is therefore immaterial whether the rate be confiscatory when it is prescribed, or afterwards becomes so by reason of changed conditions. The practical result is the same in the one case as in the other, and it cannot be doubted that the power of the courts to enjoin confiscation effected by reduction is equally ample, and its exercise equally obligatory, to enjoin confiscation effected by refusal to permit an increase. And the Supreme Court has repeatedly so held. Columbus Ry. Power & Light Co. v. City of Columbus, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. ed. 669, 6 A. L. R. 1648; Oklahoma Operating Co. v. Love, 252 U. S. 331, 40 Sup. Ct. 338, 64 L. ed. 596; San Antonio v. San Antonio Public Service Co., 255 U. S. 547, 41 Sup. Ct. 428, 65 L. ed. 777; Newton, Attorney General, v. Consolidated Gas Co., 258 U. S. ....., 42 Sup. Ct. 264, 66 L. ed. ....., * * *."

Augusta-Aiken Ry. & Elec. Corp. v. R. R. Comm. of So. Caro. (C. C. A. 4th 1922), 281 Fed. 977, 980.

In the face of the duty enjoined upon the Commission by section 32 of the Public Utilities Act to fix just, reasonable and sufficient rates, it cannot, in view of the above quoted decisions of this Court, be successfully argued that the court below erred in affording relief to the Company from the continued violation of its rights under the federal Constitution.

Appellants argue, however, that, if the Company's franchise fare provisions constitute contract obligations, its right to an abrogation of such fare by the Commission is solely a statutory one under the public utilities act of California and that upon refusal of the Commission

to change the alleged contract fare the Company's only remedy was to seek a review of the Commission's refusal in the state supreme court under section 67 of the act. Wholly aside from the inconsistency of such a position when taken by a state regulatory agency which is charged under the state law with the express duty of fixing just, reasonable and sufficient rates, whether they have been fixed by contract or otherwise (Sec. 32a, *supra*), and which has ignored the evidence before it and has arbitrarily refused to increase said fare, not on the ground it had no jurisdiction, but solely on the ground the fare was reasonable, the fundamental error in such argument lies in the fact that it totally ignores the due process and equal protection rights guaranteed by the Fourteenth Amendment of the federal Constitution. As said by this Court in *Interstate Commerce Comm. v. Louis. & Nash. R. R. Co.* (1913), 227 U. S. 88, 91:

> "But the statute here gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. **A finding without evidence is arbitrary and baseless.** And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. **It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, can be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.**"
>
> *Interstate Commerce Comm. v. Louis. & Nash. R. R. Co.* (1913), 227 U. S. 88, 91.

Moreover, the review by the state supreme court under section 67 of the act affords no possible remedy for such an arbitrary order as was made by the Commission here. To seek it would be idle and futile, for section 67 of the act provides in part as follows:

> "* * * The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the state of California. **The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.** * * * Upon the hearing the supreme court shall enter judgment either affirming or setting aside the order or decision of the commission. * * *" Sec. 67 Public Utilities Act, Stats. 1915, p. 115, 161.)

The state supreme court, in *Pacific Tel. & Tel. Co. v. Eshleman* (1913), 166 Cal. 640, 689, 701-2, construed this section by saying:

> "We may now sum up our conclusions as follows: * * * (5) That therefore the reasonableness of the railroad commission's orders and decrees may not be inquired into by any court of this state and consequently is of federal cognizance only." (p. 689. Per Henshaw, J.; Lorigan, J.; Melvin, J., concurring.)
>
> "The conclusions reached may be summarized as follows: (2) Upon a writ of *certiorari* against the railroad commission this court must inquire whether the railroad commission has acted within its jurisdiction, and if this inquiry be answered affirmatively, the proceeding must be dismissed. * * *

(4) Where the commission has acted within the powers conferred upon it by the legislature, the only recourse of one affected by its action is to the guaranties of the federal constitution. And in cases where the violation of the right guaranteed by the federal constitution does not involve an excess of the jurisdiction of the railroad commission, the federal courts are the only ones in which he may assert his rights under those guaranties."

Pacific Tel. & Tel. Co. v. Eshleman (1913), 166 Cal. 640, 689, 702.

Obviously, then, such *certiorari* could avail this Company nothing for, regardless of how arbitrary the Commission's order was and is, it found the 5¢ fare not unreasonable and the state supreme court could not disturb that finding. Here, we submit, is no mere violation of a statutory right but a direct denial both of due process and equal protection which this Court will not permit (Mississippi R. R. Com. v. Mobile & Ohio R. R. Co. (1917), 244 U. S. 388; Northern Pacific Ry. Co. v. Dept. Public Works (1925), 268 U. S. 39; Smith v. Illinois Bell Telephone Co. (1926), 270 U. S. 587).

That the decision and order of the Commission here was arbitrary is conclusively shown by the following analysis of the evidence before it.

VI.

CONFISCATION.

The record here is unique in that the evidence of all parties to the proceeding before the Commission, including the Company's, the City's and the Commission's itself, as well as the findings of fact in the Commis-

sion's decision complained of, and the evidence before the District Court clearly shows, as the trial court has found, that the Company's property is being confiscated. **In fact not a single witness for any party to the proceeding before the Commission testified other than to the fact that under the 5¢ fare the Company's system was earning a return of less than 5% on any theory of valuation.**

Since practically all of the Company's evidence before the Commission and the District Court on the subject of confiscation was based upon Company valuation and rate base figures in excess of $42,000,000 and since we have stipulated that for the purpose of an injunction we will accept the Commission's rate base of $42,000,000, we will in this argument confine our demonstration of the existence of confiscation largely to the evidence introduced before the Commission by the Commission's engineers and by the City. The Company's evidence on confiscation will be referred to only where it is based on the $42,000,000 rate base, and, to be conclusive, we will demonstrate from the record the existence of confiscation, first, on the rail lines, secondly, on the bus lines, and lastly on the combined rail and bus lines, *i. e.*, the unified system.

Rail Lines.

John E. Cooper, Assistant Transportation Engineer of the Commission, prepared and introduced in evidence before the Commission Exhibit 63 [R. 453-466, 492]. Page 29 of said Exhibit 63 is an "Estimate of Financial Results of Operation, Year 1927", segregated as to rail and bus lines [see folio page 451, between R. 464 and

465] and shows that on the Commission's undepreciated historical reproduction cost appraisal estimate for said **rail** lines the return for 1927 was 5.5%, that on the Commission's historical reproduction cost less depreciation estimate for said **rail** lines the return for 1927 was 5.6%, and that on the Commission's reproduction cost new less depreciation estimate for said **rail** lines the return for 1927 was 3.3%. Said Exhibit 63 also shows on said page 29 that increases in gross revenue are required by the Company on the Commission's said various **rail** line estimates as follows:

Increase in gross Revenue necessary to net a	H.R.C.	H.R.C.L.D.	R.C.N.L.D.
6% return	$ 407,340	$231,306	$1,154,115
7% "	913,454	598,395	1,593,080
8% "	1,408,732	963,270	2,032,198

Said Exhibit 63 on page 29 thereof also shows the Commission's 1927 appraisal estimates for the **rail** lines as follows:

H.R.C.	H.R.C.L.D.	R.C.N.L.D.
$40,121,113	$29,795,740	$36,009,325

Applying to these figures the Company's estimate of **rail** operating income for 1927 of $1,580,650, as shown in Company's Exhibit 21 before the Commission [R. 442], reveals a return on said **rail** lines of only 3.9%, 5.3% and 4.3% respectively for the year 1927. Subsequent to the introduction of said Exhibit 21 before the Commission a revised estimate of the results of operations for 1927 under the 5¢ fare was introduced by the Company and designated Exhibit 45-A [R. 446]. This

exhibit was a revision of the former estimate in the light of the facts which had occurred during the interim [R. 477], and in it the operating **rail** income for 1927 is estimated at $1,286,083, which when applied to the three Commission appraisal estimates for **rail** lines above shown, reveal a return of 3.2%, 4.3% and 3.5% respectively on such bases.[12]

In the light of the uncontradicted testimony of Company witness Sachse [R. 325, 440, 474 and 475, 481] and of City witness Wilcox [R. 451, 485] that the cost of money to the Company was not less than 6%, and the testimony of said Wilcox [R. 451, 485] and of the Commission's chief engineer Mott [R. 497, 502], that the Company was entitled to a return of not less than 7%, it would appear that the Company's rail properties devoted to the public use are being confiscated beyond any question.

Bus Lines.

All evidence before the Commission and the District Court concerning the Company's **bus** lines is that they are operated at a loss. No one contends otherwise. Indeed, page 29 of Commission's Exhibit 63 [folio p. 451, between R. 464 and 465] shows that upon all theories of valuation the Company's bus lines, with one exception, are operated not only without any return whatsoever, but at a direct out of pocket loss. The one exception is a return of 0.2% on the Company's share of Los An-

[12]The foregoing are the only figures in the record showing separately for any year both the **rail** operating income and a **rail** rate base.

geles Motor Coach Company, its jointly owned and operated bus line [R. 439].

COMBINED RAIL AND BUS LINES.

The confiscation existing on the rail and bus lines is shown separately above for the purpose of meeting certain of appellant's assignments of error to the effect that by the decree the Company's street car patrons are compelled to make up deficits accruing from its bus operations. In this connection it is here again pointed out that not only was it stipulated [R. 521] before the District Court that the Company's system was a unified one and was so considered by the Commission, but the record shows [R. 436-9] that the rates proposed in Exhibit G to the bill of complaint and put into effect under the injunction include the identical increases on all bus lines for which increases were asked before the Commission, except only such bus lines as were added, extended or discontinued between the submission of the Company's application to the Commission in August, 1927, and the filing of its bill of complaint in June, 1928. In other words, with the exception noted, the bus fares proposed to be raised in Exhibit G of the bill of complaint are identically the same as those requested to be raised before the Commission and they include **all** of the Company's bus lines except two, where the fare is 10¢, and five which are operated jointly by the Company and the Pacific Electric Railway and which could only be increased on a joint request [R. 439].

Obviously, since as above shown, confiscation exists in reference both to the Company's rail and bus lines, it

must also exist in reference to the combined facilities. But let us demonstrate from the record.

We have previously stated that there was not a single witness **for any party** to the Company's proceeding before the Commission but whose testimony and evidence showed that under the 5¢ fare a return of less than 5% was being earned on the Company's system on any estimate of value in the record. The Company's testimony and evidence before the Commission were of course based upon valuation and rate base figures greatly in excess of the Commission's rate base of $42,000,000, and its operating expense figures were all predicated upon a straight line depreciation figure in accordance with the method it has always employed in depreciating its properties. Naturally such testimony and evidence showed less operating income and a less return than the Commission's and the City's evidence,[13] so this demonstration will likewise be confined largely to the Commission engineer's and the City's testimony and evidence before the Commission.

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[13]The Company's property has always been depreciated straight line. All its operating studies and estimates before the Commission accordingly include a straight line depreciation allowance, and its showing of inadequacy of rates and of confiscation before the Commission and the court was based on a reproduction cost new less depreciation rate base. The Commission on the other hand adopted the undepreciated historical cost rate base and applied a 5% annuity depreciation allowance in operating expense. Although the Company has stipulated that for the purpose of an injunction it accepts the $42,000,000 rate base it is not to be understood that it concedes the correctness or the accuracy of any of the Commission's operating estimates.

Exhibit 49 [R. 450-1] prepared and introduced in evidence before the Commission by T. G. Hughes, special accountant for the Commission [R. 490], after an examination of the accounting records of the Company including the operating revenue and expense account, shows on page D-1 [folio page 442a-3 between R. 450 and 451] as follows:

	1925	1926
Profit (subject to reasonableness of depreciation) available for return on investment	$ 1,539,048	$ 1,291,960
Investment on basis of 1913 appraisal plus net additions but exclusive of materials and supplies and working capital	38,958,898	39,830,586
Rate of Return	3.95	3.24

In reference to this exhibit Mr. Hughes testified [R. 451] that such returns would be reduced had the amount invested included a sum representing materials and supplies and working capital, and that his figures were subject to the reasonableness of the depreciation [R. 491]. It is to be noted that the 1926 figure of $1,291,960 designated as profit available for return on investment compares favorably with the 1926 **actual** income figure of $1,281,598 shown in Company's Exhibit 35 before the Commission [R. 446].

In Exhibit 53 [R. 451-2], prepared and introduced in evidence before the Commission by Delos F. Wilcox, rate expert for the City [R. 485-90], the witness testified that in his opinion the depreciated historical reproduction cost of the Company's properties was a full and liberal measure of fair value for rate making purposes and that, hence, the rate base should not exceed

$31,000,000 [R. 451]; that the gross income of the Company available for return on the investment in 1926 was $1,283,598 or $886,402 less than a 7% return of $2,170,000, to which in his opinion the Company was entitled on his $31,000,000 estimate [R. 452]. His concluding statement is—

> "To provide for both the gross receipts tax and the Federal income tax chargeable to operation, it will be necessary to increase gross revenues in excess of $1,000,000 in order to produce the $886,402 additional income required." [R. 452-3.]

Here is a witness, absolutely disinterested so far as the Company and the Commission are concerned, whose testimony shows that even on a valuation estimate of only $31,000,000 the Company earned a return of less than 4.2% in 1926 or over $1,000,000 short of a return of 7% on that low figure. If his 1926 gross income figure of $1,283,598 is applied to the Commission's rate base of $42,000,000 it shows a bare 3% return. Here again, the witness' gross income figure of $1,283,598 for 1926 is entirely comparable to the 1926 **actual** operating income figure of $1,281,298 shown in Company's Exhibit 35 before the Commission [R. 446].

Commssion's Exhibit 63 [R. 453 to 466,][14] prepared and introduced in evidence before the Commission by John E. Cooper, assistant engineer of the Commission, shows the appraisal estimates of the Company's operative property by the Commission engineers as follows [R. 457]:

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[14]It will be noted from this exhibit that the bus lines were included by the Commission and that the $42,000,000 rate base found by the Commission in its Decision No. 19521 is simply the rounded off historical reproduction cost figure of the Commission engineers.

OPERATIVE PROPERTY—LOS ANGELES RAILWAY.

	H.R.C.	H.R.C.L.D.	R.C.N.	R.C.N.L.D.
Value of operative property as of Dec. 31, 1926, adjusted for new bus depreciation	$40,900,951	$30,080,770	$53,040,648	$36,313,470
Materials and supplies to be used in operation or to be scrapped	328,081	328,081	328,081	328,081
Total	$41,229,032	$30,408,851	$53,368,729	$36,641,551
Work in progress	256,959	275,959	244,959	271,959
Materials and supplies to be used in new construction	428,061	428,061	428,061	428,061
Total	$41,914,052	$31,112,871	$54,041,749	$37,341,571

Page 29 of said Commission's Exhibit 63 [folio p. 451 between R. 464 and 465] is an estimate by said Commission engineer Cooper of the financial results of operation for the year 1927 on the above Commission appraisals. The pertinent figures from said page 29 of said Exhibit 63 are summarized by Cooper [R. 453] as follows:

ESTIMATE OF FINANCIAL RESULTS OF OPERATION, YEAR 1927.

	Based on H.R.C. 5% sinking fund annuity depr.	Based on H.R.C.L.D. straight-line annuity depr.	Based on R.C.N.L.D. straight-line annuity depr.
Net Income	$2,070,261	$1,492,553	$1,036,379
Return in per cent	4.9%	4.8%	2.8%
Increase required to earn			
6%	715,840	502,820	1,414,982
7%	1,227,245	882,427	1,870,596
8%	1,738,650	1,262,052	2,326,211

There is also in said Exhibit 63 a table [R. 458] showing said witness' estimate of the net income and approximate return by years under both the straight-line and the 5% annuity methods of computing depreciation. This table reveals that under straight-line depreciation, the method that has always been used by the Company [R. 492], the Company's system even on the Commission's own appraisal figures earned a return of only 3.8% in 1925 and of only 3.1% in 1926; and that under the 5% annuity depreciation, the method used by the Commission in its Decision No. 19521, the system earned on the Commission's same figures a return of only 5.2% in 1925 and 4.6% in 1926.

This Exhibit 63 of Commission engineer Cooper is most significant on the question of confiscation in the light of his testimony [R. 491] that he has been in the transportation division of the Commission almost continuously since 1919, that he has a very good knowledge of the general system of this Company and has been familiar with the property in the neighborhood of five years and very intimately familiar in the last three years. Said Exhibit 63, we submit, is conclusive upon the question of confiscation for it appears from it that even upon all the Commission's own figures the Company's system has not earned a fair return since the year 1924 [R. 458].

Adopting the figures above set forth from said Commission's Exhibit 63, the Commission's chief engineer Mott prepared and offered in evidence before the Commission Exhibit 64 [R. 466 to 471, 496], in which he states [R. 468 and 497] that the 7% return figure of

$1,227,245, shown in said Exhibit 63 [R. 453] and again set forth in said Exhibit 64 [R. 467 and 468] has been used by him as indicative of the present reasonable requirements of the Company and that the present fare produces inadequate revenue [R. 498].

And in addition to this avalanche of testimony from the Commission and the City, comes the formal finding of fact of the Commission itself in the decision complained of that on its own rate base of $42,000,000 the Company earned a return of only 4.9% for the year ending December 31st, 1927 [R. 165, 167].

To all of which may be added the following evidence before the District Court, viz.:

From the affidavit of George J. Kuhrts, president and general manager of the Company, the statement that the confiscation of the Company's property had been taking place for more than two years past on the average over such period of not less than $7,000 per day [R. 315];

From the affidavit of Richard Sachse, consulting engineer of the Company, the following table D [R. 330]:

TABLE D.

Financial Results From Operation of Plaintiff's Property Under Present Rates in 1927—Actual and as Shown by Commission in Its Decision 19521.

	Item	Assumed & estimated by Commission in decision 19521	On basis of: Actual curtailed operating expenses & depreciation	On basis of: Normal operating expenses & depreciation
(a)	Total operating revenues	$13,254,000	$13,287,501	$13,287,501
(b)	Total operating expenses including depreciation and taxes	11,183,739	11,876,360	12,264,397
(c)	Net income available for return	2,070,261	1,411,141	1,023,104
(d)	Commission's rate base	42,000,000	42,000,000	42,000,000
(e)	Rate of return on (d)	4.93%	3.36%	2.43%
(f)	8% return on (d)	3,360,000	3,360,000	3,360,000
(g)	Deficiency in earnings below 8% on (d)	1,289,739	1,948,859	2,336,896

and the affiant's explanatory statements in reference to said table D [R. 328-9].

It appears, therefore, that upon appellant's own evidence before the Commission and the court, and upon the face of the Commission's own decision,—the Company's property is being confiscated at a rate of from $1,218 to $1,579 per day based on the following figures from the record:

On page 467 of the record is found the estimate introduced in evidence before the Commission by the Commission's chief engineer, A. G. Mott, upon the financial results of the Company's operations for the year 1927 under the 5¢ fare. It shows that upon the historical reproduction cost estimate of $41,914,052 of the Commission's said engineer the Company would earn only 4.9%, and that upon such estimate the Company needed additional gross revenue of $715,840 to earn a 6% return, $1,227,245 to earn a 7% return and $1,738,650 to earn an 8% return. Even assuming that a 6% return is adequate (which the courts have repeatedly refused to hold, and which the Company denies), and even for the moment accepting as correct the 5% sinking fund depreciation figures of said estimate, the fact still remains that on the Commission's engineer's said figures the Company is being deprived of a fair return on the value of its property by no less than $1,218 per day.

At page 451 of the record herein appears the report received in evidence by the Commission from Delos F. Wilcox, rate expert for the City of Los Angeles. It shows that on his rate base estimate of $31,000,000 the Company's gross income for 1926 was $886,402 **less**

than a return of 7%. This is $576,402 less than a return of 6% or a daily confiscation, even on the 6% basis, of $1,579.

On page 167 of the record appears the finding of fact of the Commission that the value of the Company's property is $42,000,000 and that the rate of return earned thereon by the Company in 1927 was 4.9%, and that the Company's net income available for return on said value in 1927 was $2,070,261. Assuming for the purpose of argument that all these figures are correct, and again assuming that a return of only 6% is adequate, the Commission's own findings of fact in said decision show a daily confiscation of the Company's property in 1927 in the sum of $1,232.

To summarize then, according to appellant's own evidence before the Commission and according to the Commission's own findings of fact,—even assuming 6% to be a fair return—

(1) If the Company's property devoted to public use is of the value of $31,000,000, the City of Los Angeles engineer's estimate of historical reproduction cost, the Company is receiving thereon $1,579 per day less than 6%, or a return of less than 4½% [R. 451];

(2) If the Company's property devoted to the public use is of the value of $41,914,052, the Commission engineer's estimate of the historical reproduction cost, the Company is receiving thereon $1,218 per day less than 6%, or a return of approximately 4.9% [R. 467]; and

(3) If the Company's property devoted to the public use is worth $42,000,000, the Commission's finding of

value in Decision No. 19521, the Company is receiving thereon, according to the Commission's finding of net income available for return, $1,232 per day less than 6%, or a return of approximately 4.9% [R. 167].

The record is clear, therefore, that upon the evidence of all the witnesses, both for the Commission and the City, in the proceeding before the Commission, and upon the Commission's own findings of fact in said Decision No. 19521, the Company is receiving a return of less than 5% on the value of its property devoted to the public use. This situation, we submit, cannot lawfully be permitted to exist in view of the holding of this Court in the case of *Ohio Utilities Co. v. Public Utilities Commission* (1925), 267 U. S. 359, 364, where it is said:

> " * * leaving a balance as return to the company of $7,566.15, or less than 5 per cent upon the value of the property. That this is so plainly inadequate as to result in depriving the company of its property without due process of law may not be doubted. See Bluefield Waterworks & Improv. Co. v. Public Serv. Commission, 262 U. S. 679, 692-695, 67 L. ed. 1176, 1182-1184, 43 Sup. Ct. Rep. 675, and cases cited; Missouri *ex rel.* Southwestern Bell Teleph. Co. v. Public Serv. Commission, 262 U. S. 276, 288, 67 L. ed. 981, 985, 31 A. L. R. 807, 43 Sup. Ct. Rep. 544.
>
> *Ohio Utilities Co. v. Public Utilities Commission* (1925), 267 U. S. 359, 364.

ECONOMIES IN OPERATION.

This drastic and uncontrovertible confiscation is attempted to be justified by the Commission in the decision complained of and in its showing before the District

Court on the alleged ground that certain economies in operation might be put into effect on the Company's system which would enable it to earn a fair return on the Commission's rate base. Said decision of the Commission makes no mention of the economies in operation it refers to but the record before the Commission discloses that such reference must have been to one-man car operation and to the establishment of an inner-neutral zone.

One-man Cars:

Two days before the final submission of the Company's application to the Commission for increased fare, the Commission's chief engineer, A. G. Mott, testified [R. 500-1, 504-5, 515-17] that in his opinion the operating expenses of the Company could be materially reduced by the adoption of one-man operated cars upon the entire system. He admitted [R. 500] that to convert the Company's present two-man operated cars into one-man cars would cost approximately $1,500,000 and that then the plan would result in an increase of only $723,000 in net income [R. 469] and stated on cross-examination as follows:

> "On the question of whether this matter has been given sufficient consideration by me and my assistants, and whether it has been sufficiently discussed with the company to justify me in making definite recommendation, **I first want to say that I have not definitely recommended any precise thing.** I certainly think the Company should use its best constructive effort in working out the details of any plan which would be most effective to the total good of the situation, having in mind both company aspects of it and the public aspects of it." [R. 516.]

In addition to the above admission of the witness that he was not recommending any precise thing, his testimony reveals that the annual increase of $723,000 which he testified would result from the 100% use of one-man cars is still short some $504,245 of a return of 7% on his historical rate base figure [R. 467, 501], the return he himself has used as the one to which the Company is entitled [R. 502]. Moreover, the entire testimony of this witness on the subject of one-man cars and the results which in his opinion would follow therefrom—and his was the only testimony in favor of such a plan—was vigorously controverted by the Company's witnesses both in the record before the Commission and in the record before the Court [R. 470, 507-8, 512, 513-14, 315-16], the witness Weeks testifying [R. 508] that it would take from eight months to a year for the Company to convert its cars for one-man use and that then the saving would only be $561,630, which is some $665,000 short of the $1,227,245 increase in gross revenue which the Commission witnesses Mott and Cooper testified [R. 467] is necessary to return the Company the 7% which said Mott used as the return to which the Company is entitled [R. 502]; and the president and general manager, Kuhrts, testifying by affidavit before the court [R. 316] that 100% one-man car operations in the City of Los Angeles under the extreme conditions of traffic and congestion existing in said City would be inexcusably poor management, would be impracticable and unworkable and in entire opposition to the desires and wishes of the public served by the Company and of the authorities of the City of Los Angeles.

Even though the Company was given no opportunity to experiment with such a plan if it had been willing to do so, and even though the Commission's decision did not order the Company to adopt such a plan, the complete and full answer to this alleged justification of confiscation is, as the Commission well knows, that jurisdiction to order into effect such a drastic change in the type of service rendered on the Company's system vests not in the Commission alone, but also in the City. The Commission could not order such a change without the consent and approval of the City [R. 510-21],[15] and the Company could not inaugurate such a change without the approval of both. The record before the Court shows [R. 316] that the City not only never approved nor consented to the Commission's chief engineer's suggestion of one-man car operation, but formally and officially opposed and condemned it.

Inner-neutral Zone:

At the same time that the Commission's chief engineer suggested the one-man car plan he also suggested as a means of increasing revenue with the retention of the 5¢ fare, that the Company establish an "inner-neutral zone" [R. 499], altho he admitted [R. 503]

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[15]Under Sec. 23, Article XII of the Constitution of California the City of Los Angeles has never surrendered to the Railroad Commission any of its powers (other than the fixing of rates) of exercising local, police, sanitary and other regulations over public utilities. (See pp. 30-31, ante.)

See:

City of Los Angeles v. Central Trust Co. of N. Y. (1916), 173 Cal. 323;

Civic Center Assn. v. Railroad Commission (1917), 175 Cal. 441.

that he knew of no system anywhere where such a zone exists. All of his testimony on this plan was controverted by the testimony of the Company's witness Weeks [R. 506] to the effect that such a plan would be impractical, would cause confusion to the public, would slow up schedules and would be the cause of complaint arising from disputes and misunderstandings, and by the testimony of the Company's superintendent of operations, Hill [R. 511-12], that such a zone plan would be extremely difficult to handle, would result in confusion and dissatisfaction, and would slow up movement in the congested district.

As in the case of the one-man car plan, this "inner-neutral zone" suggestion is completely answered by the fact that the Commission's decision did not order the Company to put it into effect and, for the reasons heretofore given, it could not as a matter of law so order without the consent of the City, and nowhere in the record does such consent appear.

A further, full and complete answer to the contentions of the Commission concerning this one-man car plan and this inner-neutral zone plan is that the record before the Commission, which was in its entirety in the record before the trial court, presents a substantial conflict in the evidence upon these two matters and the trial court has resolved that conflict in favor of the Company. Under the long established and oft repeated rule of this Court the finding of the trial court on such a conflict of evidence will not be disturbed on appeal unless shown to be clearly erroneous. There is no such showing here.

Past and Future Returns.

In finding of fact No. 3 in the decision complained of [R. 167] and in the concurring opinion of one of the members of the Commission thereto [R. 170-171] and in the Commission's showing before the District Court [R. 354, 355, 357] the confiscation of Company's property under the 5¢ fare is attempted to be justified on the ground that the Company's average rate of return for the 5 year period from 1922 to 1926, inclusive, was 7.1% and for the 14 year period from 1913 to 1926, inclusive, was 6.1%. The Company does not concede the correctness of any of the net income and per cent return figures contained either in said decision, in said concurring opinion or in Commission's said affidavit before the District Court and contends that each of said yearly net income figures have been arbitrarily increased by the Commission above the respective **actual** net income for said years,—but assuming solely for the purpose of this showing that such figures are correct, both said concurring opinion and said evidence [affidavit of Cooper, R. 354 and 355] before the District Court conclusively show that, **even on such arbitrarily increased figures, the** Company earned a return under the 5¢ fare of only 5.2% in 1925, and 4.6% in 1926. And under the finding of fact No. 4 contained in the Commission's decision [R. 167] the return for 1927 was only 4.9%. In other words, accepting for this purpose the Commission's own rate base figures and its own figures of net income and rate of return, the Commission's own evidence shows that for every year since 1924 the Company has earned less than 5½% under the 5¢ fare.

The tables in said concurring opinion and in said affidavit to the District Court purporting to show that the Company earned 9.7% in 1922 and 9.4% in 1923 cannot, we submit, even if true, have the slightest bearing on its constitutional right to a fair return at the time of the inquiry. If the returns for those two years were excessive, as the Commission's said tables purport to show, it is presumed they were acquired lawfully and with the consent of the Commission, and neither that body nor any other, under the law, can now justify present confiscatory rates on the ground that five or six years ago they afforded the Company a fair return. As said in *Newton v. Consolidated Gas Co.* (1922), 258 U. S. 165, 175:

> "Since 1907 the Gas Company has been subject to supervision by a commission empowered to prohibit unreasonable rates, and the presumption is that any profits from its business were lawfully acquired. Municipal Gas. Co. v. Public Service Commission, 225 N. Y. 89, 99, P. U. R. 1919C, 364, 121 N. E. 772. Mere past success could not support a demand that it continue to operate indefinitely at a loss. The public has no such right in respect of private property, although dedicated to public use. When it became clear that the prescribed rate had yielded no fair return for more than a year, and that this condition would almost certainly continue for many months, the company was clearly entitled to relief."
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> *Newton v. Consolidated Gas Co.* (1922), 258 U. S. 165, 175.

And in *Board of Public Utility Commissioners v. New York Telephone Company* (1926), 271 U. S. 23, 32, this Court said:

> "Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. Galveston Electric Co. v. Galveston, 258 U. S. 388, 395, 66 L. ed. 678,

692, 42 Sup. Ct. Rep. 351; Georgia R. & Power Co. v. Railroad Commission, 262 U. S. 625, 632, 67 L. ed. 1144, 1148, 43 Sup. Ct. Rep. 680. And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future. Newton v. Consolidated Gas Co., 258 U. S. 165, 175, 66 L. ed. 538, 547, 42 Sup. Ct. Rep. 264; Galveston Electric Co. v. Galveston, *supra*, 396 (66 L. ed. 683, 42 Sup. Ct. Rep. 351); Monroe Gaslight & Fuel Co. v. Michigan Pub. Utilities Commission (D. C.), 292 Fed. 139, 147; Minneapolis v. Rand (C. C. A. 8th), 285 Fed. 818, 823; Georgia R. & Power Co. v. Railroad Commission (D. C.), 278 Fed. 242, 247, affirmed in 262 U. S. 625, 67 L. ed. 1144, 43 Sup. Ct. Rep. 680; Chicago R. Co. v. Illinois Commerce Commission (D. C.), P. U. R. 1922C, 282, 277 Fed. 970, 980; Garden City v. Garden City Teleph. Light & Mfg. Co., 150 C. C. A. 25, P. U. R. 1917B, 779, 236 Fed. 693, 696."

Board of Pub. Ut. Comm. v. N. Y. Tel. Co. (1926), 271 U. S. 23, 32.

In its showing before the District Court the Commission also sought to justify the confiscation of the Company's property on the theory that the Company will, over a reasonable period of time in the future, earn a fair return under the 5¢ fare. This at best is a mere prognostication which finds no conceivable support in the record, but is claimed to be supported by the affidavit of F. E. Ball, valuation and rate engineer of the City, filed by the City before the District Court [R. 382 to 385]. The graphs attached to said affidavit [Exhibits 1 and 2 between R. 384 and 385] indicate that altho in the City of Los Angeles there has been a steady gradual increase since 1924 to and including 1927 in real estate transfers, bank clearings, post office business, number of telephones, number of active gas meters and number of car miles

operated by the Company, there has also been during said period practically no increase in population except during the year 1926, a marked steady decline in the value of building permits, practically no increase in number of passengers carried by the Company, and an almost steady gradual decrease, based on the figures above referred to from the concurring opinion of one of the Commissioners, in the Company's net income. From these graphs the witness concludes that "all indications point to factors favoring an upward trend, **if any change is to be experienced**" [R. 385] and states:

> "Since the trend of net financial income of plaintiff as based on information above mentioned, has in the past followed the trend or cycle of general Los Angeles business conditions, affiant believes that it is not without the bounds of sound logic to assume that such will be the case in the future and with predominant influence indicating a decided upward trend in general business and prosperity cycles in Los Angeles during the **latter half of the next five year period,** and with no indications of less than a substantial normal progress during the first half of said period, it follows that the plaintiff's average net income **probably** will constitute during that period a just, fair and compensatory return on the average value of its transportation system devoted to the public service."

We submit that this affidavit and the conclusions of the witness therein stated are of no evidentiary value whatever in that they are too utterly remote and speculative upon which to compel the Company to endure the continued established confiscation of its property under the 5¢ fare. How long, it might be asked, must the Company await the arrival of this day of plentitude. It has waited now in vain since 1924. Must it then

continue to wait until "the latter half of the next five year period" in the hope that "if any change is to be experienced" it will be an upward trend. This Court has repeatedly declared that a public utility is entitled to a fair return on the fair value of its properties devoted to the public use at the time of the inquiry (*Board of Public Utility Comrs. v. New York Teleph. Co.* (1926), 271 U. S. 23, *McCardle v. Indianapolis Water Co.* (1926), 272 U. S. 400), and will not, we are confident, permit the continued confiscation of the Company's property upon any such highly speculative and problematical theory of relief.

REASONABLENESS OF PROPOSED FARE.

The 7¢-6¼¢ fare authorized by the court below as a condition of the injunction and as the maximum beyond which the Company could not charge is the identical fare proposed by the Company to the Commission and rejected by the Commission. For the purpose of testing the reasonableness of said fare His Honor Judge Hunt, at the hearing before the court below, asked the Company to submit some mathematical demonstration of what rate should be charged in order to yield not to exceed 8% on the $42,000,000 rate base [R. 523]. In pursuance of such request the Company subsequently filed with the court an affidavit by its consulting engineer Sachse showing that on the $42,000,000 base **a straight 7¢ fare** would probably yield a return of 7.38% [R. 527-33], and the Commission filed a statement entitled "Computation of flat fares which will produce various rates of return on the system of the Los Angeles Railway Corporation (based on 1927 operation)." [R. 524-6.] The atten-

tion of the Court is here directed to the fact that the computation submitted by the Company in response to the court's request was signed and sworn to and set forth in detail the sources from which the figures therein contained were derived, whereas the computation submitted by the Commission was neither signed nor sworn to and contained practically no supporting data. Manifestly, therefore, the court below was amply justified in resolving this conflict in evidence in favor of the Company.

That the preponderance of the evidence in the record before the Commission on the question of the reasonableness of the proposed fare is also greatly in favor of its reasonableness is apparent from the following demonstration from that record.

Company witness Sachse collaborated in the preparation of and introduced in evidence before the Commission Exhibit 22 [R. 443] and testified in connection therewith that on the basis of a 90% use of tokens and a 5% loss in traffic the proposed fare would probably produce an operating income of $3,235,557 [R. 475-6]. This is a return of 7.7% on the Commission's $42,000,000 rate base. If there should be a greater loss in traffic the return, he testified, would of course be less [R. 476].

B. W. Campbell, transportation engineer of the Company, prepared and introduced in evidence before the Commission Exhibit 23 entitled "Estimates of Revenue from Increased Rates under Various Conditions." [R. 444.] Testifying in connection with said exhibit he stated that a fair estimate of the effect of the proposed fare would be that 10% of the revenue passengers would

pay the cash fare of 7¢ and 90% would use the 6¼¢ tokens, with a loss in traffic somewhere between 5 and 10% for the first year, which would result in a total revenue between $13,598,000 and $14,553,000 [R. 484]. Deducting from said gross revenue figure of $14,553,000 the Commission's finding of total operating expense of $11,183,739 [R. 167] leaves a net income of $3,360,000, or a return of 8% on the Commission's $42,000,000 rate base.

City witness Wilcox, testifying on the subject of increased rates, said:

> "You raise rates and decrease the use, you may go beyond the economic limit. I would say that by no means is the 5¢ fare the economic limit, 6¢ is perhaps not the economic limit and 7¢ is probably not." [R. 489.]

As against the above evidence, supported by the detailed figures of the Company in its respective exhibits, the record discloses that the only other evidence before the Commission on the subject of the proposed fare was Exhibit 64 [R. 469], prepared and introduced in evidence by the Commission witness Mott, in which he estimated that the proposed fare, with an 80% use of tokens and a 6% loss in traffic would increase the gross revenue $2,454,000, which would result in a return of 9.4% [R. 469]. In his testimony in connection with this exhibit the witness gave no supporting data and only repeated his conclusions with the added statement that: "Even under the lowest estimates this form of fare would result in increasingly liberal return" [R. 497-8].

In the face of this record before it the Commission accepted its own witness' estimate and found as a fact that the proposed fare would yield a return of 9.4% and was therefore unjust and unreasonable [R. 167].

In addition to the above record before the Commission there was also before the court below the affidavit of the Company witness Sachse, in support of the motion for interlocutory injunction, to the fact that the economic limit of the rate of fare would not nearly have been reached under the proposed fare and that if a less fare was fixed it would be extremely difficult, if not impossible, to finance necessary improvements, betterments and extensions and the Company would be forced to curtail service and to retrench to such a degree as to effect the service and the business and development of the City unfavorably and detrimentally [R. 326]. This testimony stands undenied and uncontradicted in the entire record before the court below. In the same affidavit, appear Table E and Table F [R. 332-5] which are, respectively, this witness' estimates of operating results from the proposed fare for the first 12 months after its effective date, and such results for the year 1927 if such fare had been in effect. In both tables the Commission's $42,000,000 rate base is used. These two tables, when read in connection with the witness' supporting statements in his said affidavit [R. 333 to 338], show that the proposed fare, for the first 12 months after being put into effect, and assuming operations were resumed at normal, would yield a return of 6.29% on the $42,000,000 base, and that if said fare had been in effect during 1927 it would have yielded on the $42,000,000 a return of 7.98% under

the actual curtailed operations of that year and a return of 5.92% had the operations been normal. As against this detailed analysis of the estimated results of the proposed fare the Commission and the City, up to the time of submission of the matter to the court below, offered in contradiction only the following bare conclusion from the counter affidavit of the Commission witness Mott: "Affiant believes that the establishment of plaintiff's proposed rates will produce a gross revenue in excess of $15,708,000, leaving a net income of approximately $3,950,000" [R. 353].

After the submission of the entire matter to the District Court the Commission and the Company each filed the computations referred to above, in response to the court's request for a mathematical calculation as to what rate should be charged in order to yield not to exceed 8% on the Commission's $42,000,000 rate base [R. 523]. The Commission's computation appears in full in the record here at pages 524 to 526, inclusive, and the Company's at pages 527 to 532, inclusive. In addition to the fact that the Commission's computation, as we have heretofore pointed out, is neither signed nor sworn to and contains little, if any, supporting data, its inaccuracies and distortions are as patent as are its contradictions with the testimony of the Commission's own witnesses in the record before the Commission.

No argument is necessary to persuade this Court that in an action of this kind there are three things which must be stated fairly and with reasonable accuracy; first, the value of the property (rate base); second, the income (gross revenue); and, third, the expenses (cost of ser-

vice). When the expenses are deducted from the income what is left, of course, is "the return", and the "rate of return" is the percentage of the net income based on the valuation of the property. Neither is any argument necessary to show that if any one of these three items is distorted the result (which is the fare) must necessarily be wrong and must be unfair either to the public or to the utility. The question of valuation being eliminated in this action, leaves for present analysis in the Commission's computation the two items, income and expenses. It follows also that if the gross revenue appearing in said computation is misrepresented or exaggerated the net income of course will be correspondingly misrepresented or exaggerated, and if the expenses are misstated and reduced regardless of the facts and of the record, then obviously the net income will likewise be fictitiously increased by the exact amount in which the expenses are so understated. With these fundamental principles in mind the gross revenue and expense figures of the Commission's computation can readily be shown to be inaccurate and distorted and in direct contradiction to the record both before the Commission and before the court below.

The Commission's computation purports to show three studies of the fare necessary to produce a 6% return, a 7% return and an 8% return, respectively, as well as a study purporting to show that under the proposed fare the Company will receive a return estimated at from 10.6% to 14.2% on the Commission's rate base of $42,000,000 [R. 524-5]. The inaccuracy and unreliability of the said first three studies is demonstrated by the fact that each of them, as said computation shows, is based on the

totally erroneous assumption that all revenue passengers on the Company's system would pay the 5.27¢, the 5.48¢ and the 5.69¢ fare used in said respective studies, and that in none of those instances would there be any loss in traffic.

The Commission has found, in the decision complained of [R. 167], that the proposed fare would produce a net annual return of 9.4% on $42,000,000, and the Commission's chief engineer Mott testified before the Commission that in his judgment under the proposed fare there would be a 6% loss of traffic with an 80% use of tokens, resulting in an increase in revenue of $2,454,000 [R. 469]. This is the source of the Commission's 9.4% return figure. The Commission's computation, however, purports to show that there will be only a 60% use of tokens and that the return on $42,000,000 will be 12.1% [R. 526]. In other words, although the testimony of the Commission's own chief engineer and the Commission's findings of fact is that the proposed rates would yield the Company 9.4% on $42,000,000, the computation repudiates that testimony and that finding and says that the return under the same fare and upon the same rate base would not be 9.4% but would be either 10.6%, 12.1% or 14.2%. It is to be noted here also that the source of the figures in this portion of the Commission's computation is not shown, and that it is impossible to ascertain therefrom how the individual figures are computed or upon what information or what evidence they are based. Except for the rate base figure of $42,000,000 anl a portion only of the actual operating expenses for the year 1927, the figures in said computation are based neither upon the record before the

Commission and the court below, nor upon the Company's actual experience. They are entirely new figures, except for those two items, and do absolute violence both to the actual experience of the Company, even under curtailment and abnormally low operating expenses, and to the record now before the Court.

The study contained in the Commission's said computation which purports to show "increases in net income under fares proposed by plaintiff" [R. 526], is also particularly misleading and inaccurate in its first two columns in which it purports to show that the return would be 14.2% if all passengers use the 7¢ fare and 10.6% if all passengers use the 6¼¢ token fare. It is, of course, perfectly obvious that with an opportunity to buy transportation at a considerably lower rate it is inconceivable that 100% of the car riders will ignore the lesser rate and pay the full 7¢ fare. Equally obvious it must be, from the testimony both of the Commission's witness Mott [R. 469] and of the Company's witness Campbell [R. 484], that not all of the former 5¢ passengers will continue to ride under an increased fare, and that there will be a loss in traffic of from 5 to 10%. The seriousness to the Company of a computation of this sort is apparent when it is pointed out that a 6% loss in traffic under a 7¢ fare amounts to a reduction in net income of $1,068,745; and under a 6¢ fare amounts to a reduction in net income of $916,067. Yet it is only in such manner and by such disregard of the record and the facts that the figures of net return contained in the Commission's computation are reached.

The Commission's computation is also grossly inaccurate in its depreciation figures. In order to arrive at an equit-

able and logical result the basis of figuring depreciation must be the same as the basis of the valuation or rate base. We insisted before the court below that the Commission used historical reproduction cost as the sole basis of its valuation and we have also insisted that it has similarly used historical reproduction cost as the basis for computing the Company's depreciation allowance. The Commission has denied these allegations and states that they have taken in consideration all elements of value [R. 196, 268]. For the purpose of the present proceeding, and for that purpose alone, we have accepted that denial and we have taken in our computation of operating expenses the depreciation expenses **as fixed by the Commission's own engineers for the year 1927** [fol. p. 451 between R. 464-5]. Yet the amount of $979,209 for depreciation which the Commission takes in its study entitled "Actual Operations—Year 1927", as contained in its computation [R. 524], is a 5% sinking fund calculation based on historical reproduction cost exclusively [fol. p. 451] between R. 464-5] and there should have been allowed for depreciation the straight-line amounts of either $1,556.917 or $2,013,091, both of which were fixed by the Commission's own engineer [fol. p. 451 between R. 464 and 465], and the lower of which the Company used in its computation [R. 529].

Note No. 1 of said study of actual operations for the year 1927 states that: "The actual net charges to the depreciation reserve during the year 1927 amounted to but $797,259" [R. 524]. Said amount of $797,259 has nothing whatever to do with the reserve operating allowance for depreciation for that year. Said amount does not at

all represent the depreciation of plaintiff's property for that year, but merely represents **the net retirements of property during that year, i.e.,** the amount of old property replaced by new property. The Commission's said figure of $797,259, therefore, includes nothing whatever for the depreciation that is continually taking place on all of the property that was not replaced during the year but which will have to be replaced in the future, whether that future be one year or ten years from 1927. Manifestly, any reasonable and fair annual depreciation allowance must cover the actual depreciation of all the Company's depreciable property during that year, regardless of whether such property happens to be replaced in any particular year.

It is impossible to make a **direct** check of the figures contained in the Commission's computation because the necessary underlying data are not shown. Nowhere is it shown what number of passengers the Commission estimates will pay the fare of 5.27¢, 5.48¢ or 5.69¢ to produce the estimated 6%, 7% and 8% returns, respectively, shown in the Commission's computation. It is possible, however, to make an indirect check of the figures, and to make such a check fair we will make it on the Commission's own assumptions, knowing what they are in language but not what they are in figures. The study contained in the Commission's computation entitled "to bring a 6% return" [R. 525] contains the following parenthetical note: "Calculated by adding to the basic 5¢ fare now in effect the increase in that fare represented by the above increase in gross revenue applied to the passengers of 1927 whose rates are now asked to be increased". The

studies in said computation "to bring a 7% return" and "to bring an 8% return" are similarly calculated. This note, if it means anything, must mean that the average higher fare is calculated only on that portion of the 1927 passengers who would be affected by a fare increase. The record shows [R. 444] that in 1927 more than ten million passengers did not pay the basic 5¢ fare, the majority of whom would not, therefore, be affected at all, and the rest only partially, by any rate increase. This class of passengers consists principally of school children who pay only one-half fare, 10¢ bus fares and commutation fares [R. 444]. Taking the figure of actual gross revenue for the year 1927 under the 5¢ fare of $13,287,601, shown in the Commission's said computation [R. 524], and adding thereto the figure of $638,778 purporting to show the additional gross income necessary to produce the 6% return [R. 525], gives a gross revenue figure of $13,926,379 which would be provided under a 5.27¢ average fare [R. 525]; and dividing said gross revenue figure of $13,926,379 by said average 5.27¢ fare gives a figure of **264,257,640,** which represents the total number of revenue passengers who would have to pay a fare of 5.27¢ to provide said gross revenue of $13,926.379. The record shows, however, [Chart I, Exhibit 2, between R. 384 and 385] that the total number of revenue passengers of all classes in 1927, including both rail and bus passengers and half-fare school children, was approximately **254,000,000.** In order, therefore, to produce the result shown in the Commission's computation it must have been assumed that approximately 10,000,000 **more** passengers would have paid the 5.27¢ fare than the actual number who in that

same year paid the lower 5¢ fare and all the other fares that would not be affected by any rate increase as shown above. Such an assumption and such a calculation, we submit, is worthy of no greater consideration than that given it by the court below, which ignored it. It is also a direct contradiction of the testimony of all witnesses, including the Commission's own chief engineer, all of whom testified, as we have hereinabove shown, that an increase in fare would result in a decrease in traffic variously estimated at from 5 to 10%. The Commission too, in the decision complained of, quotes [R. 169] the testimony of its chief engineer to the effect that in his opinion a decline in traffic may be expected from **any** fare in excess of 5¢, yet notwithstanding such testimony the computation submitted by the Commission to the court below completely repudiates the record before the Commission and indicates that there will be almost a ten million **increase** in revenue passengers under a higher fare of 5.27¢. The same assumptions are likewise indulged in the studies contained in said computation entitled "to bring a 7% return" and "to bring an 8% return", rendering them likewise totally unreliable.

To summarize, it is apparent from the above analysis that the Commission's computation is in direct conflict with the testimony of the Commission's own witnesses and with the finding of the Commission in that it grossly understates the Company's operating expenses and its actual and necessary expense of depreciation, and grossly over estimates and misrepresents to the extent of almost 10 million, the number of revenue passengers who would ride under the average rates of fare shown in said computation.

Contrast this computation of the Commission with that submitted to the court below by the Company and appearing in the record here at pages 527 to 532, inclusive, the latter signed and under oath, every figure therein clearly explained and its derivation identified, and all rested and founded upon the record before the Commission.

The Company computation shows that a **straight 7¢ fare** would yield a return of 7.38% on the Commission's $42,000,000 rate base [R. 530] and concludes with the sworn statement of affiant that "The above estimate is the most accurate and most reasonable computation I can make to comply with the Court's request and is based as to valuation and depreciation on the findings of the Commission and the computations of the Commission's engineers and as to revenues and operating expenses on plaintiff's actual operating experience during the last three years." [R. 532.]

The court below, we submit, was clearly justified in resolving this conflict in evidence by accepting the Company's computation [R. 547-548], and, in effect, holding that the proposed fare of 7¢-6¼¢ was not unreasonable

Conclusion.

In conclusion, it is submitted that all questions of fact involved in this appeal have been resolved by the court below in favor of the company on the conflict in evidence, and those findings have not been shown to be erroneous. The principles of law are well established and have long been adjudicated contrary to appellants' contentions.

In the *Interborough* case (*Gilchrist v. Interborough Rapid Transit Co.*, ... U. S. .....), decided by this court April 8, 1929, Mr. Justice McReynold said:

> "To support the action of the court below it would be necessary to show with fair certainty, first, that before the original bill was filed the commission had taken, or was about to take, some improper action in respect of the Interborough Company's new schedules or its application for leave to discontinue the 5 cent rate and establish one of 7 cents; and, secondly, that the 5 cent fare was so low as to be confiscatory, while the proposed charge of 7 cents was reasonable. We think neither of these things adequately appears from the record."
>
> *Gilchrist v. Interborough Rapid Transit Co.* (1929) .....U. S. ....., (73 L. Ed. 348, 355, Advance Sheets May 1, 1929.)

Both such things adequately appear in the record here. The state commission has taken improper action on the company's application for leave to discontinue the 5¢ fare and establish one of 7¢-6¼¢ The 5¢ fare, as the court below found, has clearly been shown to be confiscatory, and we have satisfied the court below, and have demonstrated to this court, that the proposed fare is reasonable.

The judgment should be affirmed.

Respectfully submitted,

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Los Angeles, California,
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